Petition

81-1677

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

IN THE MATTER OF:
MANSION HOUSE CENTER SOUTH REDEVELOPMENT CO.,
MANSION HOUSE CENTER NORTH REDEVELOPMENT CO.,
MANSION HOUSE CENTER REDEVELOPMENT CO.,
Missouri limited partnerships,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals
For the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JAMES F. GUNN
F. CRAIG KING, JR.
GUNN AND GUNN
First Missouri Bank Building
11901 Olive Blvd., Suite 312
St. Louis, Missouri 63141
(314) 432-4550
Attorneys for Petitioners

Of Counsel:

NORMAN S. ALTMAN
KROOTH & ALTMAN
2101 L Street N.W.
Washington, D.C. 20037
(202) 393-6300

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

I. Is the subject matter jurisdiction of the bankruptcy court in this case determined under Section 517 of the Bankruptcy Act of 1898 or does Section 517 merely operate to confer rights which are subject to estoppel if subject matter jurisdiction otherwise exists?

II. Is a claim of the United States made subject to Chapter XII bankruptcy proceedings under Section 455 of the Bankruptcy Act of 1898 or does Section 517 of that Act negate the clear and unambiguous provisions of Section 455?

PARTIES

The caption of the case in this Court contains the names of all parties.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit dated October 27, 1981 is reported at 661 F.2d 724 (1981) and is reproduced in the Appendix at page A-1.

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, dated July 31, 1980 is reported at 5 B.R. 826 (1980) and is reproduced in the Appendix at page A-10.

The opinion of the United States Bankruptcy Court for the Eastern District of Missouri, Eastern Division, dated October 16, 1979 is unreported and is reproduced in the Appendix at page A-25.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 27, 1981 (Appendix page A-1). A timely petition for rehearing was denied on December 2, 1981 by an unreported order which is reproduced in the Appendix at page A-55. This Petition for Writ of Certiorari was filed within ninety (90) days following that date.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The following sections of the Bankruptcy Act of 1898 are involved in this case:

Section 455 (11 U.S.C. §855):

> "If the United States is a secured or unsecured creditor of a debtor, the claim thereof shall be deemed to be affected by an arrangement under this chapter, and the Secretary of the Treasury is hereby authorized to accept or reject an arrangement in respect of the claims of the United States. If, in any proceeding under this chapter, the United States is a secured or unsecured creditor on claims for taxes or customs duties (whether or not the United States has any other interest in, or claim against the debtor, as a secured or unsecured creditor), no arrangement which does not provide for the payment thereof shall be confirmed by the court, except upon the acceptance of a lesser amount by the Secretary of the Treasury certified to the court: Provided: That if the Secretary of the Treasury shall fail to accept or reject an arrangement for more than sixty days after receipt of written notice so to do from the court to which the arrangement has been proposed, accompanied by a certified copy of the arrangement, his consent shall be conclusively presumed."

Section 517 (11 U.S.C. §917):

> "Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto; nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan Corporation or by any Federal Home Loan Bank or Member thereof."

STATEMENT OF THE CASE

The Mansion House Center in downtown St. Louis is comprised of three 29-story residential towers and related commercial areas. The North and Center Towers are apartment buildings. The South Tower, originally an apartment building, was converted to a hotel in 1975 and is currently being operated as a Holiday Inn. Petitioners are three successor limited partnerships (hereinafter sometimes referred to as "Debtors" or "Owners") which became the owners of Mansion House Center on September 28, 1976. See *United States* v. *Mansion House Center,* 463 F.Supp. 591 (E.D. Mo. 1978), aff'd. 605 F.2d 1090 (8 Cir. 1979), cert. den. 445 U.S. 917 (1980). Each tower is owned by a separate limited partnership.

The Mansion House Center was constructed in the early 1960s with substantial equity investments from the limited partners of Petitioners' predecessor limited partnerships and the proceeds of three loans (one for each tower) made by private lending institutions. Each loan was secured by a mortgage on a separate tower and each mortgage was insured by the United States Department of Housing and Urban Development ("HUD") under Section 220 of the National Housing Act, 12 U.S.C. §1715k. By enacting Section 220, Congress authorized HUD to provide mortgage insurance as an inducement to private lenders to make otherwise high-risk loans for the construction of

redevelopment projects in certain approved "urban renewal" areas as part of the national effort to eliminate slums and urban blight. Mansion House qualified under Section 220 because it was located in a blighted area of downtown St. Louis which had been designated by local officials for redevelopment.

In 1972, the mortgages went into default under the management of Petitioners' predecessors and the private lenders filed insurance claims against HUD, the insuror. Pursuant to Section 220, HUD paid the claims and the insurance terminated. The private lenders assigned the defaulted mortgages to HUD and, thereupon, HUD ceased being the "insuror" of the mortgages; HUD became the "holder" of the mortgages. Thus, during the past 10 years, the Mansion House mortgages have been "HUD-held" — not "HUD-insured".

Instead of foreclosing under the mortgages in 1972, HUD accepted a reorganization of the limited partnerships which then owned Mansion House. This reorganization included an additional cash investment of $1.5 million by the limited partners and HUD's acceptance of Maurice B. Frank ("Frank") as the new managing general partner for the project. Prior to this time, the limited partners had not known Frank and they accepted him because of HUD's enthusiastic endorsement of him as an outstanding property manager. Frank's partnership interest in Petitioners' predcecessor partnerships was acquired for a nominal consideration.

In 1974, following extensive negotiations, HUD approved Frank's plan to convert the South Tower to hotel use. However, by the middle of 1975, HUD had become disenchanted with Frank's management and the manner in which Frank had carried out the conversion. After an audit, HUD charged Frank with misappropriation of project funds during the conversion of the South Tower and insisted upon a change in management. Frank refused to relinquish control of Mansion House and claimed that he had not diverted or misappropriated any funds.

On January 12, 1976, HUD filed a nine-count complaint ("the 1976 action") against Frank in the Eastern District of Missouri (Cause No. 76-20C(2)) seeking (i) Frank's ouster from management, (ii) the appointment of a receiver and (iii) the recovery of substantial money judgments against Frank. On September 8, 1976, a receiver was appointed for the Mansion House properties pursuant to HUD's request. Petitioners (which - as will be explained below - came into existence on September 28, 1976) were not named parties to that action.

Following commencement of the 1976 action, Frank attempted to apply pressure on the limited partners to obtain their support in his litigation with the government. To this end, Frank resigned as a general partner of the predecessor partnerships on the expectation that his resignation would cause severe tax consequences to the limited partners thus forcing them to cooperate with him in the litigation in order to avoid those tax consequences.

Contrary to Frank's expectation, however, the limited partners exercised their rights under the partnership agreements and formed successor limited partnerships (Petitioners herein) on September 28, 1976 in order to continue the business and operations of the predecessor partnerships. Frank was invited to participate in the successor partnerships as a limited partner, but he elected not to do so.

After the successor partnerships had been formed, Frank had second thoughts and attempted to withdraw his resignation claiming that he was still a general partner. Because this raised the issue of ownership of the project, HUD joined Petitioners as defendants in the 1976 action on September 1, 1977 by filing a new Count Ten in its Complaint which sought a declaratory judgment as to the ownership of Mansion House. The District Court rejected Frank's claims and held that Petitioners had been legally formed as successor partnerships, that Petitioners were the owners of the project separate and distinct from the

predecessor owner partnerships and that the project should be turned over to Petitioners upon termination of the receivership. See *United States* v. *Mansion House Center, supra.*

On May 23, 1979, HUD filed separate actions against Petitioners in the Eastern District of Missouri (Cause Nos. 79-616C(2), 79-617C(2) and 79-618C(2) - hereinafter "the foreclosure actions") seeking foreclosure under the three mortgages it holds on the project. The foreclosure actions are still pending in the District Court in St. Louis.

On July 11, 1979, Petitioners filed voluntary petitions for relief under Chapter XII of the Bankruptcy Act of 1898[1] (Case Nos. 79-1032, 79-1033 and 79-1034) in the Eastern District of Missouri. Petitioners filed these petitions in order to assert their right to rehabilitate themselves financially. Petitioners were, in 1979, and remain today, financially able to present a plan of rehabilitation which would allow Petitioners to stay in business

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[1] Because the petitions were filed before October 1, 1979, the effective date of the Bankruptcy Reform Act of 1978 ("Code"), said petitions are subject to the terms of the 1898 Act. All references to bankruptcy sections will be to those of the 1898 Act unless the context clearly indicates to the contrary.

and, yet, which would provide a greater economic benefit to HUD and the General Insurance Fund than could be realized through foreclosure and sale of the project; however, Petitioners have been denied the opportunity to file any plan whatsoever in the Bankruptcy Court.

HUD filed motions to dismiss the bankruptcy proceedings and, on October 16, 1979, Honorable John J. Shanahan, United States Bankruptcy Judge, dismissed the Chapter XII petitions in an unreported opinion which is reproduced in the Appendix at page A-25.

Petitioners filed timely notice of appeal to the District Court from the Bankruptcy Court's dismissal of the Chapter XII petitions. On July 31, 1980, Honorable John F. Nangle, United States District Judge, affirmed the Bankruptcy Court's dismissal of the Chapter XII petitions in an opinion which is reported at 5 B.R. 826 (1980) and which is reproduced in the Appendix at page A-10.

Petitioners filed timely notice of appeal to the United States Court of Appeals for the Eighth Circuit from the District Court's July 31, 1980 decision affirming dismissal of the Chapter XII petitions. The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. §1291 and Section 24 of the Bankruptcy Act of 1898. On October 27, 1981, the Court of Appeals affirmed the decision of the District Court in an opinion which is reported at 661 F.2d 724 and which is reproduced in the Appendix at page A-1.

Petitioners filed a timely petition for rehearing which was denied by the Court of Appeals on December 2, 1981 by an unreported order which is reproduced in the Appendix at page A-55.

This Petition for Writ of Certiorari ensued.

REASONS FOR ALLOWING THE WRIT

I

The Decision Below Holding Section 517 Of The Bankruptcy Act To Be Determinative Of Subject Matter Jurisdiction Of The Bankruptcy Court Is In Conflict With The Decision Of This Court In *Canute S.S. Co.* v. *Pittsburgh & West Virginia Coal Co.*, 263 U.S. 244 (1923)

The decision[2] below held that Section 517 of the Bankruptcy Act of 1898 is determinative of the subject matter jurisdiction of the bankruptcy courts and that the existence of a Section 517 creditor deprives the bankruptcy court of the power to continue the proceedings in order to determine whether Petitioners could file a plan of reorganization which would not "affect or apply to" the Section 517 creditor. The dismissal of Petitioners' Chapter XII petitions has been upheld and, yet, Petitioners have never been afforded the opportunity to present a plan of reorganization which would not "affect or apply to" HUD as a Section 517 creditor. Petitioners respectfully suggest that the decision below is erroneous and is in conflict with this Court's controlling decision in *Canute S.S. Co.* v. *Pittsburgh & West Virginia Coal Co.*, 263 U.S. 244 (1923).

Under the holding in *Canute, supra,* the existence of a Section 517 creditor is not a defect which deprives the bankruptcy court of subject matter jurisdiction; rather, the bankruptcy court acquires subject matter jurisdiction over a petition which is sufficient on its face regardless of the existence of a creditor who acquires rights under Section 517. Section 517 does not remove the bankruptcy court's jurisdiction over the proceedings; it merely

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[2] Because the Court of Appeals expressly adopted the opinion of the District Court (Appendix at page A-3), the use herein of the terms "decision below" or "opinion below" or "court below" refers to both that of the District Court and the Court of Appeals unless the context clearly indicates to the contrary.

confers upon certain defined creditors the right to be unaffected by any plan of reorganization under Chapter XII.

In *Canute, supra,* a creditor objected to a bankruptcy petition on the ground that it contained allegations which could not - at the time of filing - be proved regarding the number and type of creditors necessary under the statute. This Court held that subject matter jurisdiction over a petition in bankruptcy is determined exclusively by the sufficiency of the allegations set forth in the petition and that the bankruptcy court acquires subject matter jurisdiction over a proceeding if the petition is sufficient on its face, regardless of the ability or inability of the petitioner to prove all of his allegations at the time the petition is filed. Although defects not appearing on the face of the petition may ultimately deprive the petitioner of the relief requested, such defects do not deprive the bankruptcy court of subject matter jurisdiction to determine the petitioner's right to relief. The bankruptcy court acquires subject matter jurisdiction over any petition which is sufficient and regular on its face; if the allegations in the petition meet those set forth in the statute, the bankruptcy court acquires subject matter jurisdiction over the proceedings.

The Chapter XII petitions filed by Petitioners in this case are sufficient and regular on their face since each contains allegations which meet the requirements set forth in Sections 406(6) and 423 of the Bankruptcy Act:

(i) Petitioners are not corporations;

(ii) Petitioners own chattels real;

(iii) The chattels real are subject to mortgages; and

(iv) Petitioners are insolvent.

Therefore, the bankruptcy court acquired subject matter jurisdiction upon the filing of the Chapter XII petitions and the decision below erred in affirming their dismissal.

The decision below effectively creates a new jurisdictional requirement which does not exist under the Bankruptcy Act: that Petitioners must allege in their petition that no Section 517 creditor exists. No such jurisdictional requirement exists and it was error to dismiss the petitions because such a creditor may have existed.

The plain language of Section 517 indicates that it does not operate to control the subject matter jurisdiction of the bankruptcy court. Section 517 does no more than provide that no plan of reorganization under Chapter XII can "affect or apply to" the Section 517 creditor. Section 517 does not prevent any debtor from filing a petition in bankruptcy; it merely confers a right upon the Section 517 creditor to be unaffected by any plan approved by the bankruptcy court. Section 517 operates merely to establish guidelines regarding the types of plans which may be approved by the bankruptcy court. The courts below erroneously held that the existence of a Section 517 creditor deprives the bankruptcy court of subject matter jurisdiction to determine whether or not the debtor is able to present a plan of reorganization which does not "affect or apply to" the Section 517 creditor. This Court held in *Canute, supra,* that the inability to prove - at the time of filing - all of the allegations in the petition is not fatal to subject matter jurisdiction; rather, the bankruptcy court retains subject matter jurisdiction to determine whether the petitioner may prove those allegations any time before relief is ultimately denied. In the case before this Court, Petitioners have been deprived of the opportunity to present a plan which does not violate the terms of Section 517; the bankruptcy court must retain jurisdiction over the subject matter of the proceedings to allow Petitioners the opportunity to rehabilitate themselves by presenting a plan of reorganization which does not "affect or apply to" any Section 517 creditor.

The fact that Section 517 operates to do no more than confer upon the Section 517 creditor the right to be unaffected by the debtor's plan of reorganization is very important in this case

because that right is subject to estoppel: the Section 517 creditor may by its conduct be estopped from asserting rights otherwise available to it under Section 517. In the case before this Court, HUD's unconscionable conduct[3] would estop it from asserting its rights under Secton 517. However, in order to avoid the estoppel issue, HUD has advanced the position that the bankruptcy court loses subject matter jurisdiction to review any proposed plan of reorganization if Section 517 creditor is involved.[4] However, the argument that Section 517 is jurisdictional is a classic example of bootstrapping: the mere existence of a Section 517 creditor cannot be used to destroy the bankruptcy court's subject matter jurisdiction over the proceedings and thereby prevent the Court from determining whether or not the debtor can present a plan which will not "affect or apply to" the Section 517 creditor.

Lower courts have rejected similar arguments raised by creditors in an attempt to deprive the bankruptcy court of subject matter jurisdiction. See *In re National Republic Co.*, 109 F.2d 167 (7 Cir. 1940) and *In re Earl's Tire Service, Inc.*, 6 B.R. 1019 (D.Del. 1980) (lack of subject matter jurisdiction urged

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[3] For instance, after HUD obtained the appointment of a receiver on September 8, 1976, HUD and its receiver effectively destroyed the ability of the project to remain currrent on its debt to HUD by imposing a lease of the South Tower - over the strong objection of Petitioners as its Owner - whose terms are so economically unfavorable as to be unconscionable. It is also important to note that all of the defaults alleged by HUD occurred while the project was in the hands of HUD's receiver and that Petitioners have never been in possession of their own property.

[4] Petitioners admit that some of the reported cases dealing with Section 517 have expressly adopted the position that Section 517 is jurisdictonal and that therefore the existence of a single Section 517 creditor wholly deprives the bankruptcy court of subject matter jurisdiction. Petitioners respectfully suggest, however, that none of these cases refutes the holding of this Court in *Canute, supra.*

because of a defect in the number of creditors alleged in the petition); *In re Highley,* 459 F.2d 554 (9 Cir. 1972) (lack of subject matter jurisdiction urged because petition failed to allege that individual debtor and corporate debtor were engaged in partnership); *In re Jack Kardow Plumbing Co.,* 451 F.2d 123 (5 Cir. 1971) (lack of subject matter jurisdiction urged because debtor was an individual and not a partnership as alleged); *In re Tanner,* 242 F.Supp. 172 (M.D. Pa. 1965) (lack of subject matter jurisdiction urged because debtor partnership no longer existed). In each of the foregoing cases, the jurisdictional argument was rejected.

The decision below holds - without any analysis - that Section 517 of the Bankruptcy Act of 1898 is determinative of the subject matter jurisdiction in this case. This unwarranted and unfounded constriction of the subject matter jurisdiction of the bankruptcy court is contrary to controlling decisions of this Court and presents an important question of federal law which should be resolved by this Court.

II

The Conflict Between Sections 455 And 517 Of The Bankruptcy Act Presents An Important Question Of Federal Law Which Has Not Been, But Which Should Be, Resolved By This Court

The decision below found that HUD was a Section 517 creditor in this case and, for that reason, the Court of Appeals affirmed the dismissal of the bankruptcy petitions. However, the decision that HUD is a Section 517 creditor is in direct conflict with the express wording of Section 455 of the Bankruptcy Act of 1898 which unambiguously renders claims of the United States subject to Chapter XII bankrtupcy proceedings.

In holding that HUD is a Section 517 creditor in this case, the Court of Appeals opinion failed to even mention Section 455

but adopted the District Court opinion which elevated Section 517 to superior status over Section 455 when it stated:

> "If Section 517 creates an exception, Section 455 is inapplicable; if Section 517 does not create an exception, Section 455 takes effect. *In either event, it is the language of Section 517 which controls,* not Section 455." (emphasis added) (Appendix, page A-19).

From this statement, it is clear that the court below refused to analyze the unambiguous wording of Section 455 in its finding that HUD was a Section 517 creditor; instead, the court relied exclusively on the language of Section 517 even though the court had earlier in its opinion found that Section 517 was unambiguous. (Appendix, page A-15).

Then, contrary to all rules of statutory construction, the District Court used the wording of an entirely separate and distinct statute (sections of the National Housing Act) in an attempt to clarify the ambiguity in Section 517 of the Bankruptcy Act. (Appendix, page A-16).

If the District Court had looked to the unambiguous wording of Section 455, a statute enacted within days of Section 517, the District Court would have reached the inescapable conclusion that Section 455 expressly negates any interpretation that HUD can become a Section 517 creditor.

The decisions below effectively hold that Section 455 is irrelevant to the issue of whether a claim of the United States is subject to Chapter XII; and yet the express wording of that Section is unambiguously to the contrary. Neither court below found any ambiguity in Section 455; rather, they found Section 455 irrelevant—even though a claim of the United States was directly involved in the case.

In addition, neither of the opinions below were able to answer the following questions posed by Petitioners, namely:

(i) Why shouldn't the language of Section 455 be interpreted to include claims of the United States represented by HUD-held mortgages? What basis is there for concluding that Section 517 should have a superior status over Section 455?

(ii) Why, if Congress intended to exempt HUD-held mortgages under Section 517, is HUD not mentioned in Section 517? Why is there not one word of legislative history to support an affirmative intention to exempt HUD?

(iii) How does the fact that the language of Section 517 does not expressly exclude HUD justify an inference that HUD was intended to be included within the exemption? How can such inference be squared with the clear language of Section 455?

Petitioners respectfully asked these questions in the briefs below for the sole purpose of clarifying the issues before the court. However, the Court of Appeals was unable to respond in any way to these important questions of federal law which now can only be answered if this Court issues its Writ of Certiorari.

The decision below has the effect of prohibiting Petitioners from rehabilitating themselves under the Bankruptcy Act; and yet it is in direct conflict with the cardinal rule of statutory construction that remedial legislation such as the bankruptcy laws should be liberally construed in favor of debtors and that statutes limiting such relief should be strictly construed in favor of debtor rehabilitation. The right to avail oneself of all opportunities of financial rehabilitation under the bankruptcy laws is so fundamental that it should not be taken away without the clear and unambiguous intention on the part of Congress to do so. *Israel-British Bank (London) Ltd.* v. *Federal Deposit Insurance Corporation,* 536 F.2d 509 (2 Cir. 1976), cert. den. 429 U.S. 978 (1976); *In re Zidoff,* 309 F.2d 417 (7 Cir. 1962); *Matter*

of Vickers, 577 F.2d 683 (10 Cir. 1978); *Piedmont & Northern Ry. Co.* v. *Interstate Commerce Commission*, 286 U.S. 299, 311 (1932).

The opinion below violates applicable rules of statutory construction by making every effort and taking every opportunity to construe applicable statutes against debtor rehabilitation. The language of Section 455 clearly and unambiguously renders all claims of the United States, including the secured claims of HUD under the mortgages involved in this case, subject to Chapter XII of the Bankruptcy Act. Yet the opinion below strains to adopt an interpretation of Section 517 which denies Petitioners the opportunity to rehabilitate themselves when this opportunity is so unambiguously provided within the plain meaning of Section 455.

Therefore, two important questions of federal law are presented: first, was the District Court correct when it found that Section 517 is superior to Section 455; secondly, was the District Court correct when, after it had founded Section 517 to be ambiguous, it failed to analyze and give effect to the unambiguous wording of Section 455. These questions should be resolved by this Court.

CONCLUSION

This Petition demonstrates that the United States Court of Appeals for the Eighth Circuit has taken a position in conflict with a controlling decision of this Court and that the opinion below presents important questions of federal law which have not been, but which should be, resolved by this Court. For these reasons, Petitioners respectfully request this Court to grant this Petition and issue a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted this 2nd day of March, 1982.

JAMES F. GUNN
F. CRAIG KING, JR.
GUNN AND GUNN
First Missouri Bank Building
11901 Olive Blvd., Suite 312
St. Louis, Missouri 63141
(314) 432-4550
Attorneys for Petitioners

OF COUNSEL:

NORMAN S. ALTMAN
KROOTH & ALTMAN
2101 L. Street N.W.
Washington, D.C. 20037
(202) 393-6300

Appendix

APPENDIX A

United States Court of Appeals
For The Eighth Circuit

No. 80-1907

In re Mansion House Center South Redevelopment Company, Mansion House Center North Redevelopment Company, and Mansion House Center Redevelopment Company,

Appellants,

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: September 17, 1981

Filed: October 27, 1981

Before BRIGHT, HENLEY, and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

Section 517 of the Bankruptcy Act of 1938, codified until 1978 as 11 U.S.C. §917,[1] provides as follows:

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[1] The Bankruptcy Act of 1938, also known as the Chandler Act, Act of June 22, 1938, 52 Stat. 840, codified until 1978 as 11 U.S.C. §§1 et seq., was repealed by §401(a) of the Bankruptcy Reform Act of 1978, Act of Nov. 6, 1978, 92 Stat. 2549, 2682. The effective date of the new Bankruptcy Reform Act, 92 Stat. 2682, 11 U.S.C. prec. §101

> Nothing contained in this chapter[2] shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto; nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan Corporation or by any Federal Home Loan Bank or member thereof.

The appellants, as petitioning debtors, commenced a proceeding for a real-property arrangement under the chapter (XII) which contains this provision. Appellants' land is encumbered by a mortgage held by the appellee United States, which had previously instituted suit to foreclose the mortgage. The mortgage, before its assignment to the United States, had been held by private lenders who had advanced funds to the former owners of the land, the petitioning debtors' predecessors in title. The mortgage had been insured by the Department of Housing and Urban Development under Section 220 of the National Housing Act, 12 U.S.C. §1715k, having to do with urban redevelopment. It is undisputed that Section 517 of the Bankruptcy Act, quoted above, would not have prevented the private lenders from foreclosing the insured mortgage. (Chapter XII proceedings generally operate as an automatic stay of such creditors' remedies.) But in this case the mortgage had been assigned to the United States, acting through the insuring agen-

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note, but under §403(a) of the Bankruptcy Reform Act, 92 Stat. 2683, 11 U.S.C. prec. §101 note, cases commenced under the Bankruptcy Act of 1938 shall continue to be conducted and determined under that Act. This proceeding was commenced on July 11, 1979, before the effective date of the new Act.

[2] The reference is to Chapter XII of the Bankruptcy Act of 1938, formerly 11 U.S.C. §§801-926. The Chapter is entitled "Real Property Arrangements by Persons Other Than Corporations." The appellant debtors, who commenced this proceeding for a real-property arrangement, are limited partnerships.

cy, the Department of Housing and Urban Development. The insurance had therefore determined, in the sense that the insured private lenders had been paid off, and premiums were no longer being paid. The question presented in this case is whether a mortgage that has been thus assigned to the United States is still a "mortgage insured pursuant to the National Housing Act" within the meaning of Section 517. If it is, the foreclosure suit may proceed, and Chapter XII is no obstacle. The District Court[1] held for the United States that the mortgage remains a "mortgage insured" for Section 517 purposes. We agree and affirm.

I.

We have little to add to the clear discussion of the controlling issue in the District Court's opinion, and the reader is invited to refer to it for a full analysis. See *In re Mansion House Center South Redevelopment Co., 5 B.R. 826 (E.D. Mo. 1980). In addition, after the District Court decided this case, but before the oral argument in this Court, the Seventh Circuit decided In re Thornhill Way I,* 636 F.2d 1151 (7th Cir. 1980), holding that Section 517 continues to permit foreclosure after assignment of an insured mortgage to HUD. In the main, we agree with the reasons advanced by the Seventh Circuit. Its holding is the only appellate authority in point. *Accord, United States* v. Mansion House Center North Redevelopment Co., 594 F.2d 653, 656 n.5 (8th Cir.) (dictum), *cert. denied,* 444 U.S. 835 (1979). We also agree with the District Court that the United States has not been estopped by its conduct to raise the bar of Section 517 in this case.

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[1] The Hon. John F. Nangle, United States District Judge for the Eastern District of Missouri.

II.

What has been said is sufficient to dispose of the appeal, and ordinarily we would not encumber the books with more writing on the subject. In this case, however, we deem it appropriate to discuss in brief compass some of the objections the appellant-debtors have argued so well, even elegantly, in their briefs before us.

1. Appellants point out that the Seventh Circuit in *Thornhill Way I, supra,* 636 F.2d at 1155, relies on *United States* v. *Bristol Hills Apartments,* 461 F. Supp. 1179 (E.D. Mich. 1978), and in particular quotes the following paragraph from *Bristol Hills:*

> Not only is this the most reasonable way to read the section concerned, but it is also a good rule. If the law were otherwise, a private mortgagee would have the power, by either assigning or refusing to assign its rights under the mortgage to the government, to determine whether the benefits of Chapter 12 will be available to the mortgagor. What would undoubtedly happen if this were the law is that the government would make sure not to accept assignments until foreclosure proceedings had already been effectuated. This would force some investors to hesitate to finance needed projects for fear of being a party to foreclosure proceedings because the government would not let them out by accepting an assignment.

461 F. Supp. at 1181. Appellants correctly point out that part of this statement is mistaken. It is not true that "the government would make sure not to accept assignments until foreclosure proceedings had already been effectuated," because under Section 207(g) of the National Housing Act, as added by the Act of Feb. 3, 1938, §3, 52 Stat. 8, 18-19, 12 U.S.C. §1713(g), the mortgagee has the option whether to institute a foreclosure suit on its own, or assign the mortgage to the United States and receive the benefits of the insurance. Thus, if the mortgagee decides to assign the mortgage to HUD, the agency cannot re-

ject the assignment. To the extent that *Thornhill Way I* and *Bristol Hills* are based on the premise that construing Section 517 not to be a bar to Chapter XII proceedings would induce HUD not to accept assignments, and thus make investment in insured mortgages less attractive to private lenders, the reasoning of those cases is *pro tanto* weakened. We note, however, that the paragraph quoted above is not the only, not even the predominant, reason given by the *Thornhill Way I* and *Bristol Hills* courts for their holding. And it remains true that if the bar of Section 517 is removed by assignment of an insured mortgage to the United States, and if (as appellants argue and we have agreed) an insured mortgagee may at its option make such an assignment whether HUD wants it to or not, then the statute would give the private lender power by its own unilateral act to confer on the debtor the otherwise unavailable protection of Chapter XII. Appellants urge in addition, Brief 29 n.*, that "HUD, by offering to pay 100% of the insurance, can require the mortgage to be assigned rather than foreclosed." Buy why would HUD ever choose to do so, when the consequence of its choice, under appellants' view of the statute, would be to make the mortgage unenforceable as against a Chapter XII petition?

2. Appellants also claim that the courts holding against them have misused the maxim of statutory construction, *in pari materia*. Both the District Court, *In re Mansion House Center South Redevelopment Co., supra,* 5 B.R. at 828-29, and the Seventh Circuit in *Thornhill Way I, supra,* 636 F.2d at 1154 n. 9, point out that the National Housing Act uses the terms "mortgage insured" and "insured mortgage" to refer to mortgages after they have been assigned to HUD. Section 207(k) of the National Housing Act, added by the Act of Feb. 3, 1938, §3, 52 Stat. 8, 20, 12 U.S.C. §1713(k), provides:

> The Secretary is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness,

> or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion.

This provision quite clearly uses the term "insured mortgage" to refer to a mortgage held by HUD as assignee, at which point the insurance, in the sense of a continuing contractual obligation owed by HUD as insurer to the private lender as insured, must necessarily have terminated. Clause (2) of §1713(k), moreover, uses the term "insured mortgage" in the context of a foreclosure proceeding instituted by HUD, which is exactly what we have here.

Appellants point out that the provision being construed here, Section 517, is part of the Bankruptcy Act, not the National Housing Act. They say the rule of *in pari materia* should be used to refer only to other portions of the same statute being interpreted, or at least a related statute with the same purposes, not to a different statute with different purposes. The purposes of the Bankruptcy Act are different from those of the Housing Act, the argument runs, and therefore it is not proper for a court to refer to the latter for aid in interpreting the former. The trouble with this argument is that it exalts a rule of construction into a rule of law. Canons of construction are useful in some contexts, but they are not to be inflexibly applied according to some rigid definition having no regard to the particular situation before the court. See Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How StatutesAre to Be Construed,* 3 Vand. L. Rev. 395 (1950). The important point here is that Section 517 refers in terms to the National Housing Act in describing the "mortgage insured" to which Chapter XII shall not apply. Congress necessarily decided that the general policy of the Bankruptcy Act, within the boundaries of Section 517, should yeild to that of the National Housing Act. Since a question has arisen as to the meaning of the phrase "mortgage insured pursuant to the National Housing Act," it is only common sense to look at the National Housing

Act to see what Congress meant when it said "mortgage insured." Indeed, that is all canons of statutory construction are -statements embodying a particular application of common sense. A maxim of interpretation, if taken beyond that limited function, becomes a legal mutant, not a natural growth.

3. Appellants stress that what is now Section 517 began life before the Chandler Act of 1938. Section 517 was first enacted as an amendment to Section 77B(n) of the Bankruptcy Act of 1898, codified before 1938 as 11 U.S.C. §207(n). The Act of August 20, 1935, 49 Stat. 664, amended Section 77B(n) to read in part as follows:

> (n) Nothing contained in this section [§77B, relating to corporate reorganization] shall be construed or be deemed to affect or apply to the creditors of any corporation under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto . . . .

When this statute first became law, the Federal Housing Administration, HUD's predecessor agency, was incapable of receiving assignments of mortgages. See National Housing Act, Act of June 27, 1934, 48 Stat. 1246. It could acquire property from an insured lender only after the lender itself had successfully instituted and completed foreclosure. The term "mortgage insured" could not, therefore, have referred to a HUD-held mortgage in 1935, when the predecessor of Section 517 was enacted. The reenactment of Section 517 as part of the Bankruptcy Act of 1938 was only a codification, appellants say, and codifications are not ordinarily held to work substantive changes. It follows that the term "mortgage insured" can no more refer to HUD-held mortgages today than it did in 1935.

The answer, we think, is that the original version of Section 517, like the current version, does not refer to "the National Housing Act" *simpliciter,* but to "the National Housing Act and Acts amendatory thereof and supplementary thereto." The

Act of Feb. 3, 1938, 52 Stat. 8, referred to several times already in this opinion, was entitled the "National Housing Act Amendments of 1938." It was an act "amendatory [of] and supplementary" to the National Housing Act. The term "mortgage insured" in the 1935 amendment to the Bankruptcy Act is properly construed not only in the light of the then-existing National Housing Act of 1934, but also in the light of the later-enacted National Housing Act Amendments of 1938. And this would be so even if the 1935 bankruptcy provision had not been reenacted in 1938 after the amendment of the National Housing Act. When the 1938 Housing Act amendments were enacted, moreover, Congress made an explicit cross-reference to what was then Section 77B(n) of the Bankruptcy Act. Section 11 of the National Housing Act Amendments of 1938, 52 Stat. 26, 12 U.S.C. §1733, added a new Section 514 to the National Housing Act, providing, in part, as follows:

> The provisions of . . . subsection (n) of Section 77B of the Bankruptcy Act, as amended (49 Stat. 664) . . . and all other provisions of law establishing rights under mortgages insured in accordance with the provisions of the National Housing Act, shall be held to apply to such Act, as amended.

We hold, therefore, that the rights conferred by then Section 77B(n) on private lenders holding insured mortgages under the original National Housing Act of 1934, were extended to HUD as a mortgage-holder under the National Housing Act Amendments of 1938.

4. Appellants object that such a reading of Section 517 in effect changes the phrase "mortgage insured" to "mortgage uninsured." As we have noted, the insurance is no longer outstanding after the mortgage is assigned to HUD. But it does not follow that the United States is therefore not a "creditor of a debtor under a mortgage insured pursuant to the National Housing Act." The word "insured" does not have to mean "in-

sured at the time the Chapter XII proceeding is brought." As a matter of the English language, it can just as well mean "which had been insured before assignment to the United States." English is not highly inflected. It does not have distinct one-word forms for present passive participles ("then being insured") and past passive participles ("having been insured"). The word "insured" is broad enough to bear either meaning. For the reasons we have given, we think the preferable reading is to include mortgages first insured by and later assigned to HUD.

The judgment is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

In the Matter of Mansion House Center South Redevelopment Company, a limited partnership, Debtor.

In the Matter of Mansion House Center North Redevelopment Company, a limited partnership, Debtor.

In the Matter of Mansion House Center Redevelopment Company, a limited partnership, Debtor.

Bankruptcy No. 80-61C(2).

United States District Court,
E. D. Missouri, E. D.

July 31, 1980.

HUD sought to foreclose mortgages. Debtors alleged that mortgages had been stayed by filing of Chapter XII petitions. The United States Bankruptcy Court for the Eastern District of Missouri dismissed the petitions for lack of jurisdiction and subsequently s ed effect of dismissal pending appeals. On appeal, the Distri Court, John F. Nangle, J., held that: (1) section of Bankruptcy Act, providing that nothing in Chapter XII shall be deemed to apply to creditors of any debtor under mortgage insured pursuant to National Housing Act, applied not only while mortgages but also mortgages that had been assigned to HUD, the governmental insurer, and (2) Bankruptcy Court abused its discretion in granting stay of judgment pending appeal.

Affirmed in part; reversed in part.

1. United States (key) 53(9)

Section of Bankruptcy Act, providing that nothing in Chapter XII shall be deemed to apply to creditors of any debtor under mortgage insured pursuant to National Housing Act, applied not only while mortgages were in hands of insured mort-

gagees, but also mortgages that had been assigned to HUD, the governmental insurer. Bankr.Act, § 517, 11 U.S.C.A. § 917; National Housing Act, § 201 et seq., 12 U.S.C.A. § 1707 et seq.

2. Statutes (key) 188

Starting point in interpretation of any statute must be language of statute itself.

3. Statutes (key) 223.2

In interpreting language of statute, it is relevant to consider language of related statutes.

4. Bankruptcy (key) 1004

Section of Bankruptcy Act, providing that nothing in Chapter XII shall be deemed to apply to creditors of any debtor under mortgage insured pursuant to National Housing Act, cannot be waived. Bankr.Act, § 517, 11 U.S.C.A. § 917; National Housing Act, § 201 et seq., 12 U.S.C.A. § 1707 et seq.

5. Courts (key) 37(3)

Jurisdiction may not be acquired by estoppel.

6. Bankruptcy (key) 1001

Bankruptcy Court had authority to stay the United States and HUD while jurisdictional issues with respect to applicability section of Bankruptcy Act, providing that nothing in Chapter XII shall be deemed to apply to creditors of any debtor under mortgage insured pusuant to National Housing Act, was decided on appeal. Bankr.Act, § 517, 11 U.S.C.A. § 917; National Housing Act, § 201 et seq., 12 U.S.C.A. § 1707 et seq.

7. Bankruptcy (key) 1001

Bankruptcy Court abused its discretion in granting stay pending appeal from judgment holding that section of Bankruptcy Act, providing that nothing in Chapter XII shall be deemed to apply to creditors of any debtor under mortgage insured pursuant to National Housing Act, applied to mortgages that had been assigned to HUD. Bankr.Act, § 517, 11 U.S.C.A. § 917; National Housing Act, § 201 et seq., 12 U.S.C.A. § 1707 et seq.

Gerald A. Rimmel, Receiver, St. Louis, Mo., James Gunn, St. Louis, Mo., for debtors.

Donald F. Flint, Area Counsel, Dept. of Housing & Urban Development, St. Louis, Mo., J. Christopher Kohn, Atty., Civil Division, Dept. of Justice, Washington, D. C., for HUD.

Gene M. Zafft, St. Louis, Mo., Joseph B. Moore, Asst. U. S. Atty., Dept. of Justice, St. Louis, Mo., for United States.

MEMORANDUM

JOHN F. NANGLE, Bankruptcy Judge.

This case in now before the Court for review of the Bankruptcy Court's[1] decision below, as well as review of the Bankruptcy Court's subsequent stay of the effect of its decision pending appeal. On July 11, 1979, petitions were filed under Chapter XII of the Bankruptcy Act by three limited partnerships. Each partnership claims an ownership interest in a separate twenty-eight story building. The three buildings together constitute the Mansion House Center.

The complex was originally built with the proceeds of loans extended by John Hancock Mutual Life Insurance Company and Mellon National Bank and Trust Company. These loans were insured pursuant to Section 220 of the National Housing Act, 12 U.S.C. § 1715k, by the Secretary of Housing and Urban

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[1] The Honorable John J. Shanahan, Bankruptcy Judge.

Development ("HUD"). In early 1972, the mortgages were in default and the mortgages were assigned by the institutional lenders to HUD.

Since that time, extensive litigation has ensued. It is unnecessary to the decision of this appeal to recite the lengthy history of the previous litigation. Suffice it to say that debtors herein have been found to be the owners of the properties in question, *United States* v. *Mansion House Center,* 463 F.Supp. 591 (E.D.Mo. 1978), aff'd 605 F.2d 1090 (8th Cir. 1979), cert. denied ____ U.S. ____, 100 S.Ct. 1278, 63 L.Ed.2d ____ (1980), and are entitled to possession of the respective properties upon dissolution of the receivership previously imposed by this Court. *United States* v. *Mansion House Center,* 419 F.Supp. 85 (E.D.Mo. 1976).

At present, HUD is seeking to foreclose on the mortgages which it now holds. Foreclosure actions were filed by the United States on behalf of HUD shortly prior to the filing of the instant petitions. These actions were automatically stayed by the filing of the Chapter XII petitions. See Rule 12-43, Rules of Bankruptcy Procedure.

The primary issue in this appeal is the effect on these proceedings of Section 517 of the Bankruptcy Act, 11 U.S.C. § 917. That section reads as follows:

> Nothing contained in this chapter (Chapter XII) shall be deemed to affect or to apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto; nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan Corporation or by any Federal Home Loan Bank or member thereof.

The Bankruptcy Court therefore dismissed the instant petitions due to lack of jurisdiction. The debtors appeal herein from that

dismissal. Subsequently, the Bankruptcy Court stayed the effect of this dismissal pending the completion of all appeals therefrom. This stay was occasioned principally by a desire to prevent the United States from proceeding with its pending foreclosure actions. The government appeals from this stay.

The debtors' initial contention is that Section 517 is not applicable to the mortgages held by HUD, since they are no longer "insured". Debtors contend that Section 517 applies only while the mortgages are in the hands of the insured mortgagees and the insurance thereon still outstanding.

This contention has been rejected by the majority of courts which have been faced with it. *United States* v. *Bristol Hills Apartments,* 461 F.Supp. 1179 (E.D.Mich. 1978); *In re Thornhill Way I,* No. 77 B 3676 (N.D.Ill.Bankr.Ct. January 19, 1978), aff'd No. 77 B 3676 (N.D.Ill. December 19, 1979); *In re Circle Properties,* No. 74 333 B (4-c) (E.D.Mo. March 15, 1974); *In re Ventura Towne House, Inc.,* No. Bk 74-17030-WPG (C.D.Cal. July 20, 1976). Cf. *In re Preston Tower Joint Venture,* No. 76 B 902 (N.D.Ill.Bankr.Ct. April 15, 1976); *In re Oklahoma Apts. Associates,* No. 78 B 5160 (N.D.Ill.Bankr.Ct. February 28, 1979). Indeed, this Court, and the Eighth Circuit Court of Appeals in affirming this Court, have indicated in dicta that a bankruptcy proceeding concerning the Mansion House Center was precluded by Section 517. *United States* v. *Mansion House Center,* No. 76-20 C (3) (E.D.Mo. March 10, 1977), slip op. at 10-11; *United States* v. *Mansion House Center,* 594 F.2d 653 at 656 n.5 (8th Cir. 1979), cert. denied 44 U.S. 835, 100 S.Ct. 69, 62 L.Ed.2d 45 (1979).

[1] Against this strong weight of authority debtors have made vigorous and lengthy arguments. This Court must reject these arguments, however, and affirm the conclusion of the Bankruptcy Court that Section 517 covers the mortgages involved in this case.

First of all, this Court can not assign great weight to the decision of the Bankruptcy Court for the Northern District of Illinois in *In re Oklahoma Apts. Associates, supra,* as debtors urge. That decision, as well as the decision in *In re Preston Tower Joint Venture, supra,* was effectively overruled by the subsequent decision of the District Court for the Northern District of Illinois in *In re Thornhill Way I, supra.* That decision recognized the split of authority on the issue at hand, and declined to follow the decision in *Oklahoma Apts.* This Court recognizes, however, that the applicability of Section 517 to HUD held mortgages has never been squarely presented to an appellate court. For that reason, the issue has been very carefully considered.

[2] The starting point in the interpretation of any statute must be the language of the statute itself. *Touche Ross & Co.* v. *Redington,* 442 U.S. 560, 568, 99 S.Ct. 2479, 2485, 61 L.Ed.2d 82 (1979). This Court does not view as relevant what could have been said in order to make a desired result more clear. Both sides to this appeal have presented such alternate language, and the arguments essentially cancel themselves out. What is important is what was said, not what could have been said.

The relevant portion of Section 517 states:

> Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act.

This section, though not long or complicated, is admittedly not a model of clarity. HUD, at this time, is clearly a creditor of the debtors. Likewise, it is clearly a creditor under a mortgage which was originally insured pursuant to the National Housing Act. The question is whether the language of the statute, "under a mortgage insured," limits the section's applicability to the period when the insurance is still outstanding. This Court must conclude that is does not.

[3] In interpreting the language of a statute, it is relevant to consider the language of related statutes. *United States* v. *American Building Maintenance Indus.*, 422 U.S. 271, 277, 95 S.Ct. 2150, 2154, 45 L.Ed.2d 177 (1975). The insurance provisions of the National Housing Act, to which reference is made in Section 517, are contained in 12 U.S.C. § 1707 et seq. The statutes set up a system whereby HUD insures mortgages extended by private lenders. Upon default by the borrower under the mortgage, the mortgagee has two options: it may foreclose and turn over the property to HUD in return for the insurance benefits, or it may assign the mortgage to HUD in return for the benefits. Section 1713(k) details the rights and responsibilities of HUD after assignment of the mortgage under the second option. The language of this subsection shows that a mortgage is still referred to in the statutes as a "mortgage insured" after termination of the insurance.

This subsection states, in part, as follows:

> (k) The Secretary is authorized either to (l) acquire possession of and title to any property, *covered by a mortgage insured* under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property *covered by any such insured mortgage* and prosecute such proceedings to conclusion. (emphasis added).

This section clearly refers to a mortgage after assignment to the Secretary and payment to the mortgagees of the insurance proceeds as a "mortgage insured" and an "insured mortgage". To the same effect is 12 U.S.C. § 1715k(f)(3). The use of this language in these sections to refer to mortgages after assignment to HUD strongly implies that its use should not be unnecessarily limited in Section 517.

Furthermore, § 1713(k) goes on to state that, pending acquisition by voluntary conveyance or foreclosure, the Secretary is authorized "to exercise all right of a mortgagee under such

mortgage." 12 U.S.C. § 1733, in turn, refers to subsection (n) of section 207 of Title 11, the predecessor to Section 517, as establishing rights under the mortgage. These two sections, when read together, bolster the conclusion that Section 517 is meant to apply even after assignment of the mortgage to HUD.

Also relevant is the recent Congressional statement as to its understanding of Section 517. *Red Lion Broadcasting Co.* v. *F.C.C.*, 395 U.S. 367, 380-381, 89 S.Ct. 1794, 1801, 23 L.Ed.2d 372 (1969). The new Bankruptcy Act contains no provision comparable to Section 517. Rather, the only protection afforded the Secretary is that the commencement of an action to foreclose a mortgage insured or formerly insured under the National Housing Act is not stayed by the filing of a petition. Proceedings after commencement of such an action are stayed. The legislative history accompanying this act shows Congress' understanding that this exception is much more limited than Section 517. Senate Report No. 95-989, 95th Cong., 2d Sess. 52 (1978), U.S.Code Cong. & Admin. News 1978, pp. 5787, 5838.

Debtors have presented no arguments sufficient to negate the decision dictated by the prior case law, other related statutes, and Congressional interpretations. Debtors first argue that the purpose of Section 517, as shown by the legislative history of its predecessor, is to promote private investment and private participation in the Housing Act. According to debtors, extension of the protection of Section 517 to the Secretary is unnecessary to achieve this legislative objective.

It can not be doubted that one of the objectives of § 77B(n), the predecessor of Section 517, was to encourage private participation in the insurance programs of the Housing Act. At the time of the enactment of this section, mortgagees had only one option upon default—they had to foreclose and turn the property over to the Secretary within one year of default. The present option of assigning the mortgage to the Secretary was not then available. Debtors could prevent the foreclosure, however, by petitioning for an arrangement under Section 77B. The in-

surance protection was therefore worth little. Section 77B(n) was enacted to ensure that the mortgagees would be able to foreclose.

There is evidence, however, that this was not the only purpose behind the present Section 517. In the legislative hearings prior to the adoption of Section 77B(n), the Assistant General Counsel of the Federal Housing Administration, the predecessor of HUD, testified as to the FHA's belief that low-cost housing corporations should not come within the purview of the Bankruptcy Act. This view was due to the pervasive regulation and control exercised by the FHA over these corpporations, which evidenced the public purposes which they served, *Proposed Amendment to an Act to Establish a Uniform System of Bankruptcy Throughout the United States, Approved July 1, 1898, and Acts Amendatory Thereof and Supplementary Thereto: Hearing on S. 3058 Before a Subcomm. of the Senate Committee on the Judiciary,* 74th Cong., 1st Sess. 4, 5 (1935), and the unsuitability of bankruptcy proceedings. The pervasive regulation and control of the Mansion House Center by HUD is similar to that of the low-cost housing corporation. Exemption from the provisions of the Bankruptcy Act on this ground is not unusual. See, for example, Section 4(a) of the Bankruptcy Act; *Highway & City Freight Drivers, Etc.* v. *Gordon,* 576 F.2d 1285, 1289 n.6 (8th Cir. 1978).

Secondly, the Bankruptcy Act was amended and recodified in 1938, and Section 77B(n) was included in both Chapters X and XII as Sections 263 and 517. A few months prior to this recodification, however, the National Housing Act was also amended such that mortgagees then had the option of assigning the mortgage to HUD prior to foreclosure. At the time of the recodification of the Bankruptcy Act, therefore, it was possible for the mortgagee to assign the mortgage to the Secretary. If the only purpose of Section 77B(n) was to afford protection to the private mortgagee, the section was no longer necessary. Although the timing of the legislative actions is not necessarily

conclusive as to Congress' intent to include mortgages after assignment, ef. *Shopmen's Loc. U. No. 455, Etc.* v. *Kevin Steel Prod., Inc.*, 519 F.2d 698, 705 (2d Cir. 1975), as argued by the Government, it at least casts doubts upon debtors' assertions that the *only* purpose of Section 517 was to protect private mortgagees.

Debtors also argue, relying on Seciton 455 of the Bankruptcy Act, 11 U.S.C. § 855 and *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 99 S.Ct. 1448, 59 L.Ed. 711 (1979), that HUD is to be treated just as any other commercial lender and not afforded any special protection. Section 455 states generally that Chapter XII is to apply to debts of the United States. *Kimbell Foods, Inc.*, id., held that federal liens are not to automatically be given precedence over others determining priorities. This Court finds neither of these authorities conclusive in the present case.

Kimbell Foods, Inc., id. dealt specifically with the situation when there is no federal statute setting priorities. This decision is therefore of minimal assistance in determining whether Section 517 is such a statute.

Likewise, the general principle announced in Section 455 is clearly subject to specific exceptions set out in other statutes. The second clause of Section 517 makes such an exception and debtors make no argument that the general language of Section 455 should control over this specific exception. In determining whether the first clause of Section 517 also creates an exception, therefore, the general principle of Section 455 is only that—a general principle. If Section 517 creates an exception, Section 455 is inapplicable; if Section 517 does not create an exception, Section 455 takes effect. In either event, it is the language of Section 517 which controls, not Section 455.

This Court must therefore agree with the Bankruptcy Court that Section 517 is applicable in the instant case. The Bankruptcy Court then concluded that, since Section 517 was applicable, it

lacked jurisdiction. Debtors argue that Section 517 does no more than create rights enforceable by HUD, which rights are subject to equitable estoppel. This Court must agree with the Bankruptcy Court.

The decisions dealing with Section 517 and its Chapter X counterpart, Section 263, have consistently referred to them as jurisdictional. *Bristol Hills Apts., supra; In re Thornhill Way I, supra; In re Circle Properties, supra; Oklahoma Apts. Associates, supra; Monte Vista Lodge* v. *Guardian Life Ins. Co. of America,* 384 F.2d 126 (9th Cir. 1967), cert. denied, 390 U.S. 950, 88 S.Ct. 1041, 19 L.Ed.2d 1142 (1968). Section 517 specifically states that the provisions of Chapter XII shall not be deemed to apply to or to affect any creditor under a mortgage insured pursuant to the National Housing Act. Having determined that this Section applies to HUD, it is difficult to imagine how the Chapter XII petition can be entertained without affecting HUD. The jurisdictional inquiry is whether the court has the power to act. *In re Bergmann,* 585 F.2d 1171, 1178 (2d Cir. 1978). in this situation, the bankruptcy court does not have any such power, since it lacks the power to do anything which would affect HUD.

The general jurisdictional provisions of the Bankruptcy Act do not counsel a different result. Section 411, the jurisdictional provision of Chapter XII, begins with the phrase "where not inconsistent with the provisions of this chapter." To entertain jurisdiction pursuant to Section 411 would be inconsistent with Section 517.

[4,5] This Court therefore agrees with the Bankruptcy Court that since the primary purpose of a Chapter XII real property arrangement is the modification or alteration of the rights of real property mortgagees, and the primary mortgagee in this case, HUD, may not be affected in any way by such an arrangement, the petitions must be dismissed. Likewise, Section 517, being jurisdictional, may not be waived due to debtors' allega-

tions of improper conduct on the part of HUD. *Mahoney* v. *Northwestern Bell Telephone,* 377 F.2d 549 (8th Cir. 1967). Jurisdiction may not be acquired by estoppel. Id.

Due to the above conclusions, this Court will not reach the government's contentions that these petitions should be dismissed for the additional reasons that they were not brought in good faith and that the government, as sole secured creditor of at least two of the properties, has stated in advance its unwillingness to agree to any plan.

The final issue before this Court is whether to continue the stay entered by the Bankruptcy Court. The government initially argues that the Bankruptcy Court lacked jurisdiction to stay the United Statess due to the doctrine of sovereign immunity.

Before dealing with this issue, it may be helpful to reiterate the posture in which this stay arose. The Bankruptcy Court dismissed the instant petitions due to lack of jurisdiction. This appeal followed. This appeal, and any that may subsequently follow, are merely extensions of the Bankruptcy Court's undoubted jurisdiction to decide its own jurisdiction. *Monte Vista Lodge, supra; Matter of Christian & Porter Aluminum Co.,* 584 F.2d 326 (9th Cir. 1978); *United States* v. *Mansion House Center N. Redev.,* 594 F.2d 653 (8th Cir. 1979). The Bankruptcy Court's conclusion, and this Court's agreement, that Section 517 bars the instant petitions is therefore irrelevant. What is involved is *not* the primary issue of whether the Bankruptcy Court actually has jurisdiction over the petitions, but rather the issue is what power does that court have in exercising its clear authority to decide the jurisdictional issue.

[6] With this in mind, it can be seen that the government's arguments that Section 517 bars the stay miss the point. The issue is whether, disregarding the effect of Section 517, a bankruptcy court has the authority to stay the United States or HUD while the jurisdictional issues are decided. Such authority exists only if the United States or HUD, whichever is the real

party in interest, has consented to be sued. This Court must conclude that the Bankruptcy Court below possessed such authority. The obviousness of this result can be seen by an examination of the consequences of holding otherwise.

Were the stay in this case lifted, the United States would immediately proceed with its foreclosure actions. A ruling upon review in favor of the debtors on the Section 517 issue would be rendered meaningless if the foreclosure actions were already completed. Assuming the Section 517 issue to be ultimately decided in debtors' favor, the government would have been able to escape the effects of that decision merely by foreclosing while the issue was being litigated. With the stakes as high as they are in this case, the status quo must be maintained until the jurisdictional issue is ultimately decided.

The case law fully supports this conclusion. 12 U.S.C. § 1702 allows HUD to sue and be sued in connection with the carrying out of the National Housing Act. This section waives any sovereign immunity HUD may have enjoyed. *Federal Housing Administration* v. *Burr*, 309 U.S. 242, 60 S.Ct. 488, 84 L.Ed. 724 (1940). This section also grants jurisdiction to the courts to enjoin HUD when necessary and appropriate. Id., *United States* v. *American National Bank, Etc.*, 443 F.Supp. 167 (N.D.Ill. 1977); *United States* v. *Park Side Court, Inc.*, 257 F.Supp. 177 (D.N.J. 1966); *In re Townsend*, 348 F.Supp. 1284 (W.D.Mo. 1972).

Even if, as the government argues, the party enjoined was the United States, and not HUD, *United States* v. *Waylyn Corp.*, 130 F.Supp. 783 (D.P.R. 1955), aff'd 231 F.2d 544 (1st Cir.), cert. denied 352 U.S. 827, 77 S.Ct. 40, 1 L.Ed.2d 49 (1956), the result is the same. Section 455 of the Bankruptcy Act provides that the United States may be affected by an arrangement. This section waives the sovereign immunity of the United States in this bankruptcy proceeding. *In re Delta Food Processing Corporation*, 446 F.2d 437 (5th Cir. 1971). This Court must therefore conclude that the Bankruptcy Court possessed the authority to issue the stay in this case.

[7] Finally, the government argues that the Bankruptcy Court abused its discretion in granting the stay. This Court must agree. Traditionally, the test in this Circuit as to the propriety of granting a stay pending appeal has involved four factors:

> (1) a strong showing that he is likely to succeed on the merits of the appeal; (2) a showing that, unless a stay is granted, he will suffer irreparable injury; (3) a showing that no substantial harm will come to other interested parties; and (4) a showing that a stay will do no harm to the public interest.

Reserve Mining Co. v. *United States,* 498 F.2d 1073 (8th Cir. 1974); *Ahrens* v. *Thomas,* 434 F.Supp. 873, 907 (W.D.Mo. 1977). This test is quite similar to that used in determining the appropriateness of a preliminary injunction. *Chicago Stadium Corp.* v. *Scallen,* 530 F.2d 204 (8th Cir. 1976); *Washington Metropolitan Area, Etc.* v. *Holiday Tours,* 559 F.2d 841, 842 n.1 (D.C.Cir. 1977). Cf. *Blackwelder Furn. Co., Etc.* v. *Seilig Mfg. Co., Inc.,* 550 F.2d 189 (4th Cir. 1977).

The test as to the appropriateness of a preliminary injunction has recently changed in this Circuit. Among the available tests is one which requires only a showing that there are sufficiently serious questions going to the mertis, to make them a fair ground for litigation and that the balance of hardships tips decidedly toward the party requesting the injunction. *Chromalloy American Corp.* v. *Sun Chemical Corp.,* 611 F.2d 240 (8th Cir. 1979). Debtors urge that this looser test is also to be applied in ruling on the stay request in this case. As this Court believes that even this looser test was not met in this case, it will be applied.

Undoubtedly, there are sufficiently serious questions going to the merits to make tham a fair ground for litigation. Though this Court affirmed the decision of the Bankruptcy Court, that decision wsa not an easy one, as the length of this opinion testifies. Furthermore, the points raised by debtors have never been squarely presented to an appellate court.

This Court does not believe the balance of hardships tips decidedly in debtors' favor, however. The primary point raised by debtors is the severe consequences of foreclosure. The possibility of foreclosure during the pendency of appeals, though hypothetically possible, is realistically remote. The foreclosure actions filed by the government are presently pending before this Court. Those cases are in infancy, and resolution is a long way off. Should it ultimately appear that foreclosure is imminent prior to resolution of any subsequent appeals, appropriate requests would be entertained by this Court.

Any costs associated with proceeding with the foreclosure actions do not present a great hardship to debtors. The mere cost of proceeding with litigation is not a sufficient hardship to justify a stay. *Mesabi Iron Company* v. *Reserve Mining Company,* 268 F.2d 782 (8th Cir. 1959); cf. *Ben Gutman Truck Serv.* v. *Teamsters Local No.* 600, 484 F.Supp. 893 (E.D.Mo. 1980). Also, the discovery undertaken in the foreclosure actions may prove useful in the various related actions, and those efforts would therefore not be wasted.

This Court should only reverse the Bankruptcy Court's granting of the stay if the decision below was an abuse of discretion or based on an erroneous legal premise. *Chromalloy American Corp., supra.* In the unique circumstances of this case, however, that decision must be reversed even though characterizing the decision as an "abuse of discretion" may be unduly harsh. The Bankruptcy Court based its decision on the severe consequences of foreclosure. Due to this Court's control over the foreclosure actions, however, it can be stated with certainty that foreclosure is unlikely during the pendency of appeals from the decision below. The decision below therefore loses its basis. That decision will be reversed.

APPENDIX C

United States Bankruptcy Court
Eastern District of Missouri
Eastern Division

In the matter of

Mansion House Center South Redevelopment Company,
a limited partnership

Debtor

In Proceedings for an Arrangement under Chapter XII

Bankruptcy No. 79-01032B

In the matter of

Mansion House Center South Redevelopment Company,
a limited partnership

Debtor

In Proceedings for an Arrangement under Chapter XII

Bankruptcy No. 79-01033B

In the matter of

Mansion House Center South Redevelopment Company,
a limited partnership

Debtor

In Proceedings for an Arrangement under Chapter XII

Bankruptcy No. 79-01034B

At Saint Louis, in this District, this 16th day of October, 1979.

Motion of each of the above named debtors for order directing Gerald A. Rimmel, Receiver, to relinguish possession of debtors' respective real properties filed July 12th, 1979; motion of Receiver to dismiss debtors' motion filed July 26, 1979 and motion of United States to dismiss with prejudice debtors' petition under Chapter XII of the Bankruptcy Act filed July 26, 1979 coming on for hearing on August 14th, 1979, each of the parties having filed responsive pleadings to the aforesaid motions and memoranda of law; and on said latter date debtors appearing by counsel; Reciever appearing in person and by his attorney; the United States appearing by its representative and by its attorney; oral argument being had; and the Court having considered the various motions and responsive pleadings filed by the parties, the legal memoranda, the oral argument, and being fully advised in the premises;

It is, in accordance with the findings and conclusions contained in a separate memorandum attached,

ORDERED

(1) The motion of the United States to dismiss with prejudice debtors' petition under Chapter XII of the Bankruptcy Act be and the same is hereby sustained;

(2) Motion of Debtors for order directing Receiver to relinquish possession of debtors' respective real estate be and the same is hereby denied; and

(3) Motion of Receiver to dismiss debtors' motion for possession be and the same is hereby sustained.

Bankruptcy Judge

Copy mailed to:

Gerald A. Rimmel
Receiver
7711 Carondelet - 10th Floor
Clayton, Missouri 63105

James Gunn
Attorney for Debtors
11901 Olive Street Road
Creve Coeur, Missouri 63141

Donald A. Flint
Area Counsel
Dept. of Housing & Urban
Development
Room 324
210 N. 12th Street
St. Louis, Missouri 63101

J. Christopher Kohn
Attorney, Civil Division
Department of Justice
Washington, D.C. 20530

Gene M. Zafft
Attorney at Law
7777 Bonhomme Avenue
St. Louis, Missouri 63105

Domenic L. Massari, III
Attorney at Law
Post Office Box 3239
Tampa, Florida 33602

Joseph B. Moore
Assistant United States Attorney
Room 402
1114 Market Street
St. Louis, Missouri 63101

United States Bankruptcy Court
Eastern District of Missouri
Eastern Division

In the matter of

Mansion House Center South Redevelopment Company,
a limited partnership

Debtor

In Proceedings for an Arrangement under Chapter XII

Bankruptcy No. 79-01032B

In the matter of

Mansion House Center South Redevelopment Company,
a limited partnership

Debtor

In Proceedings for an Arrangement under Chapter XII

Bankruptcy No. 79-01033B

In the matter of

Mansion House Center South Redevelopment Company,
a limited partnership

Debtor

In Proceedings for an Arrangement under Chapter XII

Bankruptcy No. 79-01034B

MEMORANDUM

On July 11, 1979, petitions were filed under Chapter XII of the Bankruptcy Act by Mansion House Center South Redevelopment Company, Mansion House Center North Redevelopment Company and Mansion House Center Redevelopment Company, limited partnerships organized and existing under the Uniform Limited Partnership Act of Missouri. (R.S. Mo. Chapter 359). The real estate to which these debtors assert an ownership interest, denominated the Mansion House Center, comprises three 28 story tower buildings, office, commercial and satellite structures, presently utilized for residential, commercial and motor hotel purposes. The complex was originally constructed with the proceeds of loans made by John Hancock Mutual Life Insurance Company and Mellon National Bank and Trust Company. These loans were endorsed for insurance pursuant to Section 220 of the National Housing Act by the Secretary of Housing and Urban Development. On April 21, 1964 the Secretary and Debtors' predecessor partnerships entered into Regulatory Agreements setting forth the respective rights and obligations of the parties. In February and March 1972, the mortgages being in default, were assigned by the Institutional lenders to HUD.

Maurice B. Frank, and Ocean Sea Breeze, Inc. a corporation owned by Frank, were general partners of the predecessor partnerships and Frank assumed control of the Center. On January 12, 1976 an action was instituted by the United States to protect the interests of the Secretary as mortgagee of the Mansion House Center. The action originally sought the appointment of a Receiver for the project, and the recovery of money from

Frank and Frank controlled entities, which had been expended in violation of the Regulatory Agreements. On September 8, 1976, the District Court appointed Gerald A. Rimmel as Receiver to assume control over and operate the project. *United States* V. *Mansion House Center North Redevelopment Company, a limited partnership, et al, (E.D. Mo., 1976) 419 Fed. Supp. 85).*

On July 31, 1976 Frank resigned as general partner and the limited partners exercised their rights under the partnership agreements by organizing successor partnerships, which bear the same name as the predecessor partnerships. Debtors are these successor partnerships. *United States of America* v. *Mansion House Center North Redeveolpment Company, a limited partnership, et al. (E.D. Mo. 1977), 426 Fed Supp, 479.* On September 1, 1977, the United states amended its original complaint to seek a declaration of identity of the owner-mortgagor. Both the Frank group and the group purporting to have succeeded to ownership of the properties filed motions for summary judgment. Frank's motion was denied. *United States* v. *Mansion House Center N. Redev. Co., (E.D. Mo. 1977) 463 Fed. Supp. 591.* The motion of the successor group was granted entitling it to possession of the assets of the partnerships. *United States* v. *Mansion House Center, North Redev. Co. (E.D. Mo. 1977), 463 Fed. Supp. 595; affirmed October 1, 1979, No. 79-1169 (8th Cir.).*

On January 11, 1978, the Frank group filed Chapter XII bankruptcy petitions in the United States District Court for the Northern District of Illinois. The Receiver applied for instructions that he was not bound by the Illinois bankruptcy proceedings, and additionally requested a show cause order for a temporary injunction against the Frank group enjoining it from proceeding with the Chapter XII proceedings filed in Illinois. On August 17th, 1978 the Distrtict Court filed a Memorandum granting the Receiver's request for relief. *United States* v. *Mansion House Center, (E.D. Mo. 1978) 455 Fed. Supp. 434 aff'd.*

(8th Cir. 1979) 594 Fed. 2nd, 653, petition for cert. filed 47 U.S. L.W. 3828 (U.S. May 29, 1979) (No. 78-1784).

On May 23, 1979 the United States filed complaints seeking judicial foreclosure of the mortgages held by it on the Mansion House Center. These cases have been consolidated and are now pending in the District Court. On July 11, 1979, as heretofore indicated, the successor partnerships, as debtors, filed the instant Chapter XII proceedings. On July 12th, 1979 debtors filed a joint motion for an order directing the receiver to deliver and relinquish possession of the Mansion House Center to them and for other relief. August 14th, 1979 was fixed as the return date of said motion. On July 16th, 1979 the Bankruptcy Court entered an order continuing the receiver in possession pending the hearing on debtor's motion, and in order to permit the filing of responsive pleadings by the United States and the receiver. On July 26th, 1979 the United States filed a motion to dismiss with prejudice debtors' petitions under Chapter XII of the Bankruptcy Act. On the same date the Receiver, Gerald A. Rimmel, filed a motion opposing delivery of possession of the Mansion House Center to debtors. Voluminous memoranda were filed by all of the parties in support of their respective positions, and oral argument was had on August 14th, at which time the various motions were taken under submission.

The principal issues raised by the motions, the memoranda submitted by the parties, and the oral argument presented at the August 14th hearing may be briefly summarized, as follows:

(1) Whether Section 517 of the Bankruptcy Act requires dismissal of these proceedings because the only real property possessed by the debtors is subject to mortgages, which were originally insured pursuant to the National Housing Act, and are now held by HUD.

(2) Whether the Chapter XII proceedings should be dismissed at the outset because of the announced intention of HUD, as the alleged sole secured creditor of Mansion House Center North

Redevelopment Company and Mansion House Center Redevelopment Company, and as the overwhelmingly largest secured creditor of Mansion House Center South Redevelopment Company (and the only creditor of Mansion House Center South Redevelopment Company secured by real property), to refuse consent to any plan filed by the debtors.

(3) Whether the Chapter XII petitions should be dismissed at this stage in the proceedings because they were filed in bad faith.

Preliminary to discussing the effect to be given to Section 517, the pertinent portion of the section is herein set out:

> "Nothing contained in this chapter (Chapter XII) shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto;...."

A distillation of the respective arguments advanced by HUD and the Receiver on the one hand, and debtors on the other, involves the meaning to be attached to the word "insured" in the phrase "under a mortgage *"insured"* pursuant to the National Housing Act." HUD and the Receiver argue that the entire phrase is merely descriptive of the character of the mortgages and obligations secured thereby, and is not intended to make any distinction in the role of the United States as an "insurer" or "holder" of the mortgage. Debtors argue to the contrary that the key word in the phrase is *"insured"*. The words "a mortgage insured pursuant to the National Housing Act" do not cover these mortgages, it is asserted, because they were not at the time of filing the Chapter XII proceedings "insured" mortgages having previously been assigned to HUD who presently holds them. Particular emphasis is laid by debtors upon certain legislative history in connection with Section 77B(n) of the Bankruptcy Act,[1] enacted August 20, 1935, to

[1]H.R. 1644, 74th Congress, 1st Session (1935) and Hearings before a Sub committee of the Senate Committee on the judiciary, U.S. Senate, 74th Congress, 1st sess. on S. 3058 (1935)

establish that the purpose of Congress in adopting this section was to encourage *private* lenders to invest in loans secured by mortgages under the National Housing Act, by exempting these mortgages from provisions of the Bankruptcy Act which would have delayed foreclosure of the mortgages if reorganized proceedings were filed.

Statutory construction, it has been said, is at best an imperfect science and cases are multitudinous where rules of construction are employed which seemingly reach disparate results depending upon the variables involved. Illustrative of the point is the language in *Latimer* v. *Sears, Roebuck & Company,* (5th Cir. 1960) 285 Fed. 2nd, 152, where the Court stated: "The impeccable principle that statutes in pari materia must be read together, as with most canons of statutory constructions, has its opposite number in the dichotomy of well-worn but serviceable canons readily available for use on both sides of any disputed question of interpretation." Even the time honored axiom that the criterion of decision on the issue of statutory construction is "legislative intent" has been distinguished by Justice Holmes in a remark "We do not inquire what the legislature meant, we ask only what the statute means". *(Holmes, Collected Legal Papers, p. 207 (New York, 1920); Schwegmann Bros.* v. *Calvert Distillers Corp.,* 341, U.S. 384, 95 L. Ed. 1035, 71 S.Ct. 745 (1951). Whatever criterion is employed in determining the meaning of a statutory section one must in the first instance look to the language in which the section is framed, and if that is plain, and if the law-making body which passed it, the sole function of the Courts is to enforce it according to its terms. *Palmore* v. *Superior Court of the Dist. of Columbia* (CCA D.C. 1975) 515 Fed. 2nd, 1294; *Monte Vista Lodge* v. *Guardian Life Ins. Company of America,* (9th Cir. 1967) 384 Fed. 2nd, 126.

Section 517, which admittedly had its genesis in Section 77B(n) applies to all creditors of the debtor. The word "Creditors", as used in Section 77B(n)10 includes all holders of claims of whatever character against the debtor or its property, including claims under executory contracts whether or not such

claims would otherwise constitute provable claims under this Act. Section 406(5) of Chapter XII states that "creditors" shall mean the holders of claims; and Section 406(6) states that "Claims shall include all claims of whatever character against the debtor or his property whether or not such claims are provable under Section 63 of this Act and whether secured or unsecured, liquidated or unliquidated, fixed or contingent."

In *Foust* v. *Munson S.S. Lines,* 299 U.S. 77, 57 S.Ct. 90, 81 L.Ed. 49, (1936), the Supreme Court in discussing the word "creditor" in a Section 77B context stated: "Mere reading of the pertinent parts of the above mentioned provisions makes it plain that "creditors" and "claims" as used in proceedings under Section 77B are more comprehensive in the Act before the addition of that section." While referred to by the parties as an "insurer", the role of the Government under the National Housing Act is more akin to that of a "guarantor" or "surety". That a party occupying such role is a "creditor" of the debtor is uniformly accepted. (*1 Collier on Bankruptcy, 14th Edition, Sec. 1.11, p.79).* In *Schwartz* v. *Siegel,* (8th Cir., 1902), 117 Fed. 13, the Court stated: "A creditor is 'one who has the right to require the fulfillment of an obligation or contract.' *Bouvier Law Dict. p. 435.* An indorser, an accommodation maker, or a surety on an obligation of a debtor has a right to require the fulfillment of the obligation or contract of that debtor. ' "Creditor" shall include anyone who owns a demand, or claim provable in bankruptcy'.... The debt of a principal debtor to his indorser, his accommodation maker, or his surety before the latter has paid the obligation is a contingent liability founded on contract, and falls directly within the terms and meaning of subdivision 4 of this section... An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a person whose individual undertaking secures the claim against the bankrupt estate of the holder of that obligation, and by the terms of this section he may prove that claim whenever the creditor fails to do so. The language is broad, comprehensive, and without exception. He has the same right to prove it before as after he

discharges the obligation in whole or in part, and if he is an indorser he has the same right to make his proof before as after his liability ceases to be contingent and becomes fixed.....and an indorser or a surety has a provable claim against the estate of a bankrupt, *and is his creditor under the act of 1898 before, as well as after, his liability becomes fixed.*" (Emphasis added).

In *United States* v. *Bristol Hills Apartments,* 461 F. Supp. 1197 (D.C. Mich. 1978), in analyzing this same statutory section the District Court stated "The key words in the statute are "pursuant to" in the sentence "Nothing shall . . . affect . . . creditors . . . insured pursuant to the National Housing Act . . ." The section is not limited by its terms to the time period "while such insurance on the mortgage remains outstanding" as is the case of 12 U.S.C. Section 1731 b(a). The lack of this language in 11 U.S.C. Section 917, in addition to the use of the broad phrase "pursuant to" leads to the conclusion that the section applies to all mortgages which came into being under the insurance provisions of the National Housing Act whether those mortgages have remained in the hands of private investors or have been assigned to the governmental insurer".

The conclusion reached by the Michigan District Court affirms an opinion of the Bankruptcy Judge for that district[2] which states in this connection, in part:

> "The debtor also seeks to avoid the impact of Section 517 by contending that, in any event, the provision is inapplicable if the Government satisfies its insurance obligation and becomes the holder of the mortgage prior to the filing of the Chapter XII proceeding.
>
> The second clause of Section 517 prohibits the "extension or impairment of a secured obligation "held" by the

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[2] In th Matter of Bristol Hills Apartments. Debtor U.S.A. v. Bristol Hills Apartments. (E.D. Mich. 1978) 4 Bankr. Ct. Dec. 164.

Home Owners Loan Corporation or any Federal Home Loan Corporation whereas the first clause makes Chapter XII inapplicable to "*the creditors of a debtor under a mortgage insured pursuant to the National Housing Act.*" (Emphasis added). The second clause comes into play only when a secured obligation is held by certain indentifiable creditors. However, the first clause has no such limitation. The terminology employed makes it clear that Congress was aware of the difference between the character of the obligation and the entity holding the obligation. If Congress had intended that the first clause of Section 517 apply only when the mortgage was held by an entity other than the government, it is reasonable to assume that it would have so stated instead of using the more inclusive phrase "creditors of the debtor."

Of particular import to this Court is the fact that the District Court for this district in *United States* v. *Mansion House Center North Redevelopment Company,* No. 76-20C(3) (E.D. Mo.), has passed upon this precise point. While the decision concerned itself principally with the issue of contempt on the part of Maurice B. Frank, for violation of the District Court's September 8, 1976 order appointing a Receiver for the Mansion House Center, Judge Nangle in his opinion stated:

> "The Court has carefully considered the evidence in support and in opposition to this motion. It is the Court's firm conviction that defendant Frank has filed the bankruptcy petitions in bad faith and the true purpose in so filing was to wrest possession from this Court's receiver. The Court bases this conclusion on the inability of defendant Frank to file a petition on behalf of the (South) Company since he was not a General Partner thereof; on his dubious ability to file a petition on behalf of a corporation whose charter had been revoked; *and on the fact that Chapter XII Proceedings are not available to the Company. 11 U.S.C. Section 917cf. In re Circle properties, No. 74-333 B(4-c) E.D. Mo. March 15, 1974).*" (Emphasis supplied).

The *Circle Properties* case, to which reference is made, involved Section 263 of Chapter X, the language of which is identical to the first clause of Section 517 of Chapter XII. In that matter the District Court affirmed a decision of a Bankruptcy Judge of this District, dismissing a petition for lack of jurisdiction, on the ground that Chapter X proceedings could not apply to the United States, because it was a creditor holding a mortgage by assignment, which had been insured pursuant to the National Housing Act. In addition, in *United States* v. *Mansion House Center North Redevelopment Co.*, 594 Fed. 2nd, 753 (8th Cir. 1979), petition for cert. filed, 47 U.S.L.W. 3828 (U.A. May 29, 1979) (No. 78-1784), the Court of Appeals of this Circuit, in affirming the District Court's order enjoining Maurice B. Frank and the various Redevelopment companies of which he was general partner from asserting any ownership interests in Mansion House Center in any pending or future bankruptcy proceedings, stated:

> "The government contends that Section 517 of the Chandler Act, 11 U.S.C. Section 917, is an alternative basis upon which we may affirm the District Court. The text of that section reads thus:
>
> > Nothing contained in this chapter shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act and Acts amendatory thereof and supplementary thereto, nor shall its provisions be deemed to allow extension or impairment of any secured obligation held by Home Owners' Loan corporation or by any Federal Home Loan Bank or member thereof.
>
> We find few cases using or interpreting this section of the Bankruptcy Act. See *Homeowners Loan Corporation* v. *Creed,* 108 Fed. 2nd, 153 (5th Cir. 1939) Section 517 applies only to Chapter XII of the Act). Two recent cases, *United States* v. *Bristol Hills Apartments,* No. 8-71118 (E.D. Mich. Dec. 14, 1978), and

In re 83rd Realty Company, No. 76 B 1922 (S.D.N.Y. April 14, 1978), rely exclusively on Section 517. In both cases the District Court held that Section 517 clearly permitted the Bankruptcy Court to dismiss a Chapter XII petition on motion of the holder of a mortgage insured pursuant to the National Housing Act.

We find this argument persuasive but we do not base our decision on Section 517, since in this case other grounds are sufficient. Additionally, the District Court in this case did not rely on Section 517." (Emphasis added).

The debtors' response to the views expressed by the District Court and the 8th Circuit Court of Appeals, in the prior proceedings relating to this very property, is that neither Judge Nangle nor the Appellate Court had occasion to analyze the scope and applicability of Section 517 and its legislative background, This Court is not entitled to treat the matter in such cavalier fashion. In a similar context, the District Court in *Highland Supply Corporation* v. *Reynolds Metals Company* (D.C. Mo. 1965) 246 Fed. Supp. 510, stated: "Absent a controlling Supreme Court ruling, this Court is required to give great weight to the pronouncements of our Court of Appeals, even though they appear by way of dictum. While not excused from making an independent examination of the precise issue presented, "we cannot assume that our Court of Appeals writes merely for intellectual exercise." (Citing cases). Although admittedly the Court of Appeals did not base its decision on 517, the same cannot be said concerning the opinion of the District Court in *United States* v. *Mansion House Center North Redevelopment Company* (*supra*) where the Court, in finding Frank's action contemptuous stated: "The Court bases this conclusion on the inability of Frank to file a (Chapter XII) petition on behalf of the (South) Company . . . *on the fact that Chapter XII proceedings are not available to the Company.*"

This Court also assumes that the District Court does not write "merely for intellectual exercise" and in the absence of controlling superior authority is constrained to follow its opinion as the law of the case.

In addition to the foregoing judicial authorities, other courts which have addressed the issue have reached the same conclusion. in *Thornhill Way I,* (Case No. 77B-3676, N.D. Ill. E.D. 1978 (appeal pending), a proceeding for an arrangement under Chapter XII, the Bankruptcy Judge squarely held that Section 517 makes no distinction between the original mortgagee, and its subsequent assignee, the original insurer under the mortgage, the United States of America. The Court in holding that the exemption applied to the United States both before its acquisition of said mortgage, as insurer thereof, and after its acquisition, upon default and assignment, as owner of the mortgage, stated:

> "The phrase "mortgage insured pursuant to the National Housing Act. . ." is descriptive of the character of the mortgages and obligations secured thereby which are without the effect and application of Chapter XII of the Bankruptcy Act and is not intended to distinguish in its effect the status of the United States of America as the insurer and as the owner thereof."

In **In re Delta Food Processing Corp., Inc.** (5th Cir. 1971) 446 Fed. 2nd, 437, the Court evidenced its understanding that the statutory exemption applied to the governmental agency" when it held the mortgage. While *Delta* involved Section 263 of Chapter X, the language of this latter section is identical with the first clause of Section 517, and likewise had its origin in former Section 77B(n). The Court stated:

> "There is only one section of the Bankruptcy Act concerning the exclusion of a governmental agency from being subject to a Chapter X restraining order. (Citing Section 263). Congress, by express exclusion, removed property mortgaged under the National Housing Act from the

authority of the Bankruptcy Court in corporate bankruptcy proceedings. This has not been done for any other governmental agency, including the Small Business Administration. At any time, Congress can list other *governmental agencies* to which such exclusion shall apply; but until it does, this Court cannot agree with appellant's contention that a reorganization court cannot enjoin a governmental agency . . ."

The single dissent from the foregoing judicial pronouncements is found in *In re Oklahoma Apartment Associates*, No. 78 B 5160 (B.Ct.N.D. Ill. Feb. 28, 1979), upon which debtors heavily rely. In *Oklahoma Apartment Associates*, likewise a proceedings for arrangement under Chapter XII, HUD had filed a mortgage foreclosure, as assignee of the original insured mortgagee, prior to the institution of the Chapter XII proceedings. Upon the filing of debtor's petition, HUD filed a motion to dismiss the proceeding on the basis of the Section 517 exemption. The Bankruptcy Judge concluded that Section 517 "evidence Congressional intent to promote, protect and encourage private investors who participated in the programs initiated under the National Housing Act, as opposed to protecting the governmental agency." In reaching this result, the Court emphasizes the language of a Committee Report of the House of Representatives at the time Section 77B(n) was being considered, (H.R. 1644. 74th Congress, 1st Session (1935) which recites the problem then being experienced in obtaining private investment in low-cost housing corporations, because of the delay in obtaining insurance benefits, where reorganization proceedings were instituted.

In support of its finding that 77B(n) was designed only to protect the private insured lender, the Court added that the legislative intent of the National Housing Act was directed to "*private* initiative, *private* effort, and *private* investment...". The Bankruptcy Judge felt that even though the National Housing Act was amended in February 1938, to permit assignment by

the original mortgagee of the mortgage to the Government before foreclosure, the fact that Section 517 was not also amended by the Chandler Act of June 1938 evidences Congressional intent not to protect the Government. The Bankruptcy Court concluded by finding that a literal interpretation of the language of Section 517 requires that emphasis be put on the word "insured" in the first clause of Section 517. Since the insurance is termined upon assignment of the mortgage to HUD, the latter agency becomes holder of a mortgage which is then no longer *insured* pursuant to the National Housing Act, and hence the Section 517 exemption is not applicable.

While it is undeniable that the brief legislative history which is available reflects Congressional concern with the plight of private investors, who would be delayed by corporate reorganization proceedings from concluding foreclosure proceedings, I do not agree that the private investor was the *only* concern of Congress in enacting Section 77B(n), or the prior National Housing Act. As to the latter act, it has been held that one of the purposes of the law is to afford to the Federal Housing Administration the finest protection of its security interest. *United States* v. *View Crest Garden Apartments, Inc.*, 268 Fed. 2nd, 380; *United States of America* v. *Mountain Village Company,* (D.C. Mass. 1976) 424 F. Supp. 822. In the same case the Court, in speaking of the National Housing Act, adverts to "the federal policy to protect the treasury and to promote the security of federal investment which in turn promotes the prime purpose of the Act - to facilitate the building of homes by the use of federal credit."

We likewise reject as dispositive the rationale of the Court in *Oklahoma Apartments Associates,* which is echoed by debtors in their various memoranda, that the Government could not have been within the intendment of Section 77B(n), as originally enacted, because foreclosure of the mortgage which was then mandatory made it impossible for the Government to be a creditor under a mortgage, insured or otherwise. If, as we have

pointed out, the Government as a mortgage guarantor is a creditor, as that term was defined in Section 77B(n)10, both before and after foreclosure, there is no practical reason for applying the exemption one way when the mortgage is held by the original insured mortgage and to refuse to apply it the same way when title has passed to the Government. In determining the purpose of the amendment in 1935, it should be noted that the Government would likewise be affected by reorganization proceedings since delay in obtaining possession of the property[3] and

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[3] Various Courts had concluded that they had jurisdiction over property covered by a mortgage, in 77B reorganization proceedings, even after foreclosure, during the redemption period. *Provident Mutual Life Insurance Company* v. *University Ev. L. Church,* (9th Cir. 1937) 90 Fed. 2nd, 992; *In re Argyle Lake Shore Bldg. Corp.* 7th Cir. 1935) 78 Fed. 2nd, 491. This concern of Congress with the Government's need to obtain possession of the property without delay subsequently resulted in the February 1938 amendment to the National Housing Act which permitted assignment of the mortgage to FHA. See Sen. Rep. 1300, 75th Congress, 2nd Sess. to accompany H.R. 8730 which states:

> "The conditions under which debentures are issued in payment of the mortgage insurance is entirely changed... It is further felt that it is undoubtedly to the interest of the Administrator to obtain control of these properties at the earliest moment after default in order to preserve them and the income derived therefrom without delay." To same effect: H.R. 1655, 75th Cong. 2nd Session, Dec. 16, 1937.

the uncertainty of valuation of the property[4] would result. The fact that Congress had as one objective the encouragement of private investment in the field of low cost housing does not obviate any other objectives which it had at that time. *Hackley* v. *Roudebush* 520 Fed. 2nd, 108, 171 U.S. App. D.C. 376 (1975). It must be remembered that the Federal Housing Administration drafted the language which was incorporated into the Bankruptcy Act as Sec. 77B(n) and this Court does not believe it intended to exclude itself as an affected creditor from the benefits of the exemption.

Debtors additionally contend that when Chapter XII was enacted in June 1938 as part of the Chandler Act, thereby amending former Section 77B, there was no intention to enlarge the scope of former Section 77B(n). In light of our conclusion that the language of Seciton 77B(n) as originally enacted included the Government as an exempt entity, there is no necessity to rely upon a "broadening" of the statute to sustain the exemption. We do not agree, however, that in considering the scope of Section 517, we may not consider subsequent amendments to the National Housing Act. Section 77B(n) specifically provides that the creditors exempted should include not only those "under mortgages insured pursuant to the National Housing Act", but

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[4] A major portion of the presentation of Mr. Abner H. Ferguson before a subcommittee of the Senate Judiciary Committee at a hearing on Section 77B(n) concerned itself with provisions of Section 77B relating to valuation of the property in reorganization proceedings. For example, he states: "In other words, it puts secured creditors in the hands of somebody to make an appraisal of the property in which they necessarily have no part, and they must, even though they do not consent, take the amount based upon the appraisal of the property or the securities issued in lieu of cash, at their election." It would appear that where the Government was insurer of the loan under provisions of the National Housing Act, the risk of inadequate valuation of the property in a reorganization proceeding would fall most heavily on the Government, rather than the insured lender, a fact of which Congress was presumptively aware. (Hearing before Subcommittee of the Committee on the Judiciary, 74th Congress, 1st Session on S. 3058).

also those under "*Acts amendatory and supplementary thereto.*" When an adopted statute is amended, as in this case, it may affect the construction given to the adopting statute, at least where the intent to do so is specifically expressed. This is not a new rule of construction; "nor is it a departure from the logic and reason which characterize the Court's interpretation of the law of the land." *Royle* v. *Standard Fruit & Steamships Co., et al.* (N.Y.S.Ct. 1944) 50 N.Y.S. 2nd, 351. In *2A Sutherland Statutory Construction, Sec. 51.08, p. 324,* the rule is stated:

> "A statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, *unless the legislature has expressly or by strong implication shown its intentions to incorporate subsequent amendments with the statute.*"

In February 1939, the National Housing Act Amendments of 1938 were enacted. Section 207(g) of the Amended Act (12 U.S.C. Sec. 17.13(g) provided that upon default by the mortgagor for a period of 30 days, the mortgagee was entitled to receive the benefits of the insurance, upon assignment to the Secretary of all rights and interests arising under the mortgage. The mortgagee under said Section was likewise given the option to foreclose and to receive the benefits of insurance upon conveyance of title satisfactory to the Secretary. Section 207(k) of the Amended Act (12 USC Sec. 1714(k) further provided that "pending such acquisition by voluntary conveyance or by foreclosure, the Administrator is authorized with respect to any mortgage assigned to him under the provisions of subsection (g), "*to exercise all the rights of a mortgagee under such mortgage,* including the right to sell such mortgages, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage."

When Congress enacted Section 517, which re-enacted the language of Section 77B(n), it must be presumed that it had

knowledge at that time of the statutory amendments to the National Housing Act which had been incorporated into the prior law, and which gave to the Government all of the rights of the original mortgagee, as well as permitted assignment to the Government of the mortgage in lieu of foreclosure. If Congress at that point intended the Government to have more limited rights after assignment of the mortgage than it was affording the original mortgagee, it would have said so, in light of the statutory amendments which in effect placed the Government in the shoes of the original mortgagee.

The observations of the Bankruptcy Judge in *Bristol Hills Apartments,* is valid when he said:

> "This is particularly so in light of the fact that the clause to be construed was enacted to implement the purpose of the National Housing Act and that Congress therefore must be presumed to have been aware of the fact that upon default by the mortgagor a mortgagee in order to obtain the benefits of insurance was required to either assign the mortgage to the Secretary of Housing and Urban Development or foreclose and convey the property to the Secretary and that the Government, therefore, would in many cases become holders of such mortgages. 12 USC. Sec. 1713(g).
>
> Moreover, since the mortgagee pursuant to Section 1713(g) has the option, upon default by the mortgagor, to assign the mortgage or foreclosure and convey the property to the Government if the debtor's contention were adopted, the impact of Chapter XII upon property insured under the National Housing Act would depend upon the option the mortgagee chose to exercise. *It is inconceivable that Congress intended by virtue of Section 517 to give to mortgagees holding mortgages insured by the Government*

the power to dictate the availability of Chapters X and XII to a debtor." (Emphasis added)[3]

Both debtors and the Government allude to Section 362(b)7 of the new Bankruptcy Code, which specifically exempts from the automatic stay the commencement of any action "in which the mortgage or deed of trust held by the Secretary of HUD is insured or was formerly insured under the National Housing Act. Debtors urge that the change in language, i.e., use of the word Secretary instead of creditor, and use of the phrase "formerly insured" mandates an interpretation that Congress recognized that the existing Act, by its terms, did not intend for "formerly insured" mortgages to be covered. The Government in turn contends that Section 362(b)7 of the Code represents a narrowing of prior rights of the Secretary. In support of this they cite a Senate Report at the time the Code was being considered which suggests that the exception allowed by Section 362(b)7 is more limited than Section 517 which created "a general exception for such loans". This Court's views concerning Section 517 are not changed by either argument. The Bankruptcy Code is a new statute. Section 401(a) of the Code repeals the prior Act. Section 362(b)7 of the Code is not a statutory reenactment of Section 517. It relates to exemptions from the automatic stay provisions of Section 362. We believe the general rule is applicable that a later statute may not be used as an aid in the interpretation of earlier statutes. *Pratt* v. *1st California Company, Inc., et al,* (10th Cir. 1975) 517 Fed. 2nd, 11. Similarly we believe the Senate Report regarding 362(b)7 is entitled to little weight. In this connection, it has been stated

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[3] Subsequent amendments to the National Housing Act which specifically use the phrase "while such insurance on the mortgage remains outstanding" (12 U.S.C. 1731b(2)), and the lack of this language in either Sec. 77B(n) or Sec. 517 reinforces our view that all mortgages which came into being under the insurance provisions of the National Housing Act were intended to be covered. (*U.S.* v. *Bristol Hills Apartments* (D.C. Mich.) *supra.*

that the views of one Congress or the meaning of a statute enacted by an earlier Congress are entitled to little weight. *Moorer* v. *Department of Housing & Urban Development,* (D.C. Mo) 417 F. Supp. 126, aff'd. in part, rev. in part, 561 Fed. 2nd, 175 (8th Cir. 1977), cert. den. 98 S.Ct. 2266, 436 U.S. 919, 56 L.Ed. 760.

Debtors, finally, argue that even though the Court rules in favor of HUD on Section 517, it still would have jurisdiction over debtors' Chapter XII proceedings. The arguments presented by debtors in this regard were raised in *Monte Vista Lodge* v. *Guardian Life Insurance Company of America,* (9th Cir. 1967) 384 Fed. 2nd, 126, which involved the same language of Section 263 of Chapter X, wherein the Court stated "We hold that the District Court properly concluded that it did not have jurisdiction." In response to the claim that the Court's inherent equity powers, or Section 2(a)(15) of the Bankruptcy Act, supported the continuance of the initial restraining order, the Court added:

> "However, neither the inherent equity powers of the Court nor Section 2(a)(15) can permit a Bankruptcy Court to act beyond its primary jurisdiction. Section 263 eliminates the property described from the authority of the Bankruptcy Court in a Chapter X proceeding, *and it therefore has no power to protect non-existent jurisdiction.*" (Emphasis added).

Additionally, the Court agrees with the Government's position that jurisdiction cannot be acquired by estoppel. *Mahoney* v. *Northwestern Bell Telephone,* 377 Fed. 2nd, 549, (8th Cir. 1967); accord., *Poole* v. *Lykes Bros. Steamship Co., Inc.,* 273 Fed. 2nd, 423 (5th Cir. 1960); *Silvers* v. *Maryland Cas. Company,* 239 Fed. 2nd, 865, 3rd Cir. 1956); *In re Federal Facilities Realty Trust,* 227, Fed. 2nd, 651, (7th Cir. 1955). Debtors' argument to the contrary is premised on the contention that Section 517 is not jurisdictional, with which we expressly disagree.

While our conclusions on lack of jurisdiction mandate dismissal, reference should likewise be made to the Government's additional grounds for dismissal. In this connection, the Bankruptcy Court in *In the Matter of Thornhill Way I, (supra)*, after concluding that Chapter XII proceedings could not affect or apply to the United States as a creditor "under a mortgage insured pursuant to the National Housing Act", declined to decide the issue, which is also present in the instant case, whether a Chapter XII proceeding would be appropriate where the United States was the only creditor holding a debt secured by real estate, and where at the outset it announced its refusal to accept any plan proposed or contemplated that would constitute an arrangement of the debt owing to it. Since the Section 517 exemption removed the only creditor holding debt secured by real estate for which a plan of arrangement could be proposed, the Bankruptcy Judge saw no reason to address the "sole secured creditor" issue as an academic matter and dismissed the case on the jurisdictional point.

In this case, in addition to its Section 517 jurisdictional argument, the Government moved for dismissal on the grounds "(2) The United States, as the debtors' sole secured creditor, objects to any plan of arrangement and, therefore, the proceedings cannot result in the consensual agreement intended under Chapter XII, (3) the petitions were not filed in good faith." In their answer to the Government's motion, debtors assert "(4) HUD's motion to dismiss, even if well founded, is premature." Additionally, debtors' answer to the government's motion prays that "In the event this Court determines that there are issues of fact requiring determination, then debtors request that a trial date be fixed by the Court and that a reasonable schedule for pretrail discovery be determined. In that regard, debtors intend to (i) take depositions of all appropriate HUD representatives, receiver and all other witnesses, (ii) take detailed interrogatories and (iii) seek extensive production of documents."

In considering debtors' defense that a ruling on the Government's motion to dismiss on the "sole secured creditor" and "good faith" issues are premature, it is necessary to review the prior course of these proceedings. As has been indicated, debtors filed their Chapter XII petitions on July 11, 1979 and on the following day filed a joint motion for an order directing that possession of the Mansion House properties be delivered to them. The return day on the motion was fixed as August 14th, 1979. On July 16th, the Court entered an order continuing the receiver in possession pending the August 14th hearing on debtors' motion. On July 26th, the Government filed its motion to dismiss, and a motion opposing turnover of the property to debtors, which were joined in by the receiver. On August 14th, oral argument was had on the various motions, and they were taken under submission.

The petition filed by debtors did *not* include copies of a proposed plan. A list of creditors, a summary of assets and liabilities, and an affidavit pursuant to local rule were attached to the petitions. Debtors also filed an application for further time to file a statement of executory contracts, schedules and statement of affairs. No action has been taken by the Court on this application, which additionally recites that the debtors will file updated lists of creditors after obtaining necessary information from the Receiver, who has been in possession of the property since September 1976.

It appears to this Court that the precise issue involved in the present case was ruled in *Sumida* v. *Yumen,* 409 Fed. 2nd, 654 (9th Cir. 1969) which is cited by debtors in support of their defense that dismissal at this stage of the proceedings would be premature. In *Sumida,* debtors filed a petition which included a copy of the proposed plan, a list of creditors, and a summary of assets and liabilities. At the same time, a motion for extension of time in which to file schedules was filed. In the extended period, the petition was completed by filing the required schedules. Prior to that date, a motion to dismiss was filed,

which among other grounds charged that the plan of arrangement was not proposed in good faith. The motion to dismiss was taken up prior to a first meeting of creditors, along with a motion for continuance filed by the debtors. At the hearing on these motions, 5 secured creditors (out of a total of 23) appeared, although not served with notice. Evidence was adduced as to the need for continuance, and on the merits of the proposed plan. The Court denied the motion for continuance and sustained the motion to dismiss at the conclusion of the hearing.

The Court of Appeals suggested in its Opinion that if the issue were merely one of passing on the validity of the District Court's findings that good faith was not evidenced from the testimony adduced at the hearing, it would have no difficulty in doing so. However, since the motion to dismiss was made, heard and decided before a meeting of creditors was called or held, it reversed the judgment. In so doing, the Court first pointed out that a creditor may move for dismissal on jurisdictional grounds, but that lack of good faith is not jurisdictional. Other than for jurisdictional reasons, the power to dismiss Chapter XII proceedings is only granted to the Court by Section 427 (failure to comply with order of indemnity), Sec. 482 (applicable in certain situations after a plan of arrangement has been confirmed by the Court), and Section 481, which sets out six additional grounds for dismissal, none of which were applicable in *Sumida* (or in the present Case).

In *Sumida* a plan was filed with the petition. Section 423 provides that the debtor "set forth" the terms of his plan in his Chapter XII petition and under Section 435 the notice of the first meeting of creditors must be accompanied by a copy of the plan. Since *Sumida* was decided (1969), Chapter XII Rule 12-26 has been adopted which now permits the debtor to file a plan with his petition *or thereafter,* but not later than a time fixed by the Court. Where the plan is not filed prior to the date set for the first meeting of creditors, the Court, at the first meeting or thereafter, shall fix a time for filing a plan. Rule 12-36(d). In the

instant matter, as indicated, no plan has been filed, nor has a time been fixed by the Court for the filing of the plan. A first meeting of creditors has not been held to date, by reason of the filing of the motion to dismiss. Rule 12-24 provided that where such motion to dismiss is filed, "the Court may delay fixing a date for such meeting."

In a reply memorandum, the receiver suggests that the dismissal in *Sumida* resulted from the fact that the Court had not given the required ten days notice of the creditors' meeting to consider dismissal. While it is true that in *Sumida* there were a number of secured creditors affected, which made it conceivable that Seciton 461 (11) of the Act might be brought into play, there is no agreement between the parties in this case that a similar situation might not be present. The debtors do not admit in their answer to the Government's motion that HUD is a sole secured creditor. As stated in their reply memorandum: "Finally, Receiver and HUD have prematurely injected into this case the question whether relief can be obtained under Section 461(11) against a sole secured creditor. They have not established that HUD is a sole secured creditor. Mercantile Bank may be a secured creditor, and there may be other secured creditors, as well as many unsecured creditors. The lessee under the hotel lease may assert rights akin to those of a secured creditor. Until it becomes clear who the creditors are and until the notice of their claim is established, there should be no determination of the scope of relief under Section 461 (11). The necessary information as to creditor claims must be provided, pursuant to Section 508 and Rule 12-50, by the Receiver who incurred the obligations before a decision on the so-called "cram-down" questions can be made. Nor have the debtors been required to file a plan under Rule 12-36(a). The "cram-down issue is thus not ripe for decision at this time."

I agree with the statement of debtors as hereinabove set out. So also, I agree with the Court in *Sumida* that "good faith" is not an issue at this point. In this connection, the Court stated at l.c. 659:

"The District Court also purported to rule on the "good faith" of the debtors' submission of the arrangement. In Chapter X there is a provision in Sec. 4141 of the Act, 11 U.S.C. §541, providing that "upon the filing of a petition by a debtor, the Judge shall enter an order approving the petition, if satisfied that it complies with the requirements of this Chapter (Ch.X) and has been filed in good faith, or dismissing it if not so satisfied." There is no such provision in Chapter XII requiring the Court to pass on the merits of the petition as soon as it is filed. "Good faith" is considered by a Court in a Chapter XII proceeding only after the plan has been approved by creditors and confirmation is requested by the debtor. See Sec. 472 of the Act, 11 USC Sec. 872 (1964)..."

Accordingly, I conclude that the motions to dismiss, on the grounds that the United States, as debtors' sole secured creditor, objects to any plan or arrangement, and that the petitions were not filed in good faith, being prematurely filed, should be overruled.

This Court is aware that its determination on the jurisdictional issue will be appealed. During the course of this appeal the normal procedures in a Chapter XII proceeding can be followed. A date will be set for filing of schedules, statements of affairs and executory contracts. A first meeting of creditors will be held and a date fixed for filing a plan. While at this point it seems remote, nevertheles as stated in *Sumida* "There is always the possibility that facts will be brought out at the creditors' meeting, including the attitude of the creditors themselves, which will throw new light upon the proceeding." For this reason, we also think it better that the Court adhere to the normal procedures prescribed in Chapter XII.

In accordance then with our conclusions on the jurisdictional issue, an order will be entered contemporaneously (1) granting the motion of the Government to dismiss the petitions, (2)

granting the Receiver's motion to dismiss debtors' motion for possession, and (3) denying debtors' motion for possession.

Illegible
Bankruptcy Judge

St. Louis, Missouri
October 16, 1979

Copy mailed to:

Gerald A. Rimmel
Receiver
7711 Carondelet - 10th Floor
Clayton, Missouri 63105

James Gunn
Attorney for Debtors
11901 Olive Street Road
Creve Coeur, Missouri 63141

Donald F. Flint
Area Counsel
Dept. of Housing & Urban
Development
Room 324
210 N. 12th Street
St. Louis, Missouri 63101

J. Christopher Kohn
Attorney, Civil Division
Department of Justice
Washington, D.C. 20530

Gene M. Zafft
Attorney at Law
7777 Bonhomme Avenue
St. Louis, Missouri 63105

Domenic L. Massari, III
Attorney at Law
Post Office Box 3239
Tampa, Florida 33602

Joseph B. Moore
Assistant United States Attorney
Room 402
1114 Market Street
St. Louis, Missouri 63101

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1981

No. 80-1907

In the Matter of:

Mansion House Center South Redevelopment Company,
Appellant,

Mansion House Center North Redevelopment Company,
Appellant,

Mansion House Center Redevelopment Company,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Petition of appellants for rehearing filed in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby, denied.

December 2, 1981

Opposition

Office - Supreme Court, U.S.
FILED
MAY 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1677

In the Supreme Court of the United States

OCTOBER TERM, 1981

MANSION HOUSE CENTER SOUTH REDEVELOPMENT CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

J. CHRISTOPHER KOHN
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether Section 517 of the Bankruptcy Act (11 U.S.C. 917), which was repealed in 1978, required dismissal of these Chapter XII real property arrangement proceedings.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-9) is reported at 661 F. 2d 724. The opinion of the district court (Pet. App. A-10 to A-24) is reported at 5 Bankr. Rep. 826. The opinion of the bankruptcy court (Pet. App. A-29 to A-54) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 1981. A timely petition for rehearing was denied on December 2, 1981 (Pet. App. A-55). The petition for a writ of certiorari was filed on March 1, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Mansion House Center is an apartment and motel complex in St. Louis, Missouri.[1] It was constructed in the mid-1960's with approximately $35 million in proceeds from notes and mortgages insured pursuant to Section 220 of the National Housing Act, 12 U.S.C. 1715k. In 1972, petitioners defaulted on their mortgage payments, and the private mortgagees assigned the notes and mortgages to HUD upon payment by HUD of the mortgage insurance. HUD currently holds the defaulted notes and mortgages (Pet. App. A-13, A-29).

On January 12, 1976, after terminating for default an interim workout agreement with the mortgagors, the United States instituted an action to protect its interest as mortgagee of the Mansion House Center. Upon the government's motion, a receiver was appointed to operate and manage the project. *United States* v. *Mansion House Center North Redevelopment Co.*, 419 F. Supp. 85 (E.D. Mo. 1976) (Pet. App. A-29 to A-30).[2] On May 23, 1979, the United States filed three separate complaints seeking judicial foreclosure of the mortgage on each tower. *United States* v. *Mansion House Center Redevelopment Co.*,

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[1]The complex consists of three towers owned by petitioners Mansion House Center South Redevelopment Company, Mansion House Center North Redevelopment Company, and Mansion House Center Redevelopment Company (Pet. 3).

[2]In September 1976, as a result of the resignation of the mortgagor partnerships' general partner, Maurice B. Frank, a dispute as to ownership of the Mansion House complex arose between two competing groups. One group was controlled by Frank; the other group, petitioners, was controlled by representatives of the limited partners. The United States amended its complaint to seek judicial resolution of the dispute. Petitioners were found to be the owners of Mansion House Center. *United States* v. *Mansion House Center North Redevelopment Co.*, 463 F. Supp. 591 (E.D. Mo. 1978), aff'd, 605 F. 2d 1090 (8th Cir. 1979), cert. denied, 445 U.S. 917 (1980) (Pet. App. A-13, A-30).

No.79-0616(2) (E.D. Mo.); *United States* v. *Mansion House Center North Redevelopment Co.*, No. 79-0617(2) (E.D. Mo.); *United States* v. *Mansion House Center South Redevelopment Co.*, No. 79-0618(2) (E.D. Mo.). The foreclosure actions were consolidated and are now pending in the district court (Pet. App. A-13, A-31).

On July 22, 1979, petitioners initiated these proceedings under Chapter XII of the Bankruptcy Act in the United States District Court for the Eastern District of Missouri.[3] Petitioners sought an order terminating the receivership and giving them possession of the Mansion House Center. The district court denied the request without prejudice, and the receiver remained in possession (Pet. App. A-31).

Shortly thereafter, the United States moved to dismiss the Chapter XII petitions. On October 16, 1979, the bankruptcy judge granted the motion, holding that Section 517 of the Bankruptcy Act (11 U.S.C. 917) requires dismissal of a Chapter XII arrangement proceeding that involves property subject to a mortgage insured under the National Housing Act, even if the insured private investor has assigned the mortgage to HUD (Pet. App. A-29 to A-53). Both the district court (Pet. App. A-10 to A-24) and the court of appeals (Pet. App. A-1 to A-9) affirmed.

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[3]The Frank group had previously filed petitions under Chapter XII of the Bankruptcy Act in the Northern District of Illinois. In view of the ownership dispute, the United States District Court for the Eastern District of Missouri enjoined the Frank group from claiming ownership of the Mansion House Center in the Illinois Chapter XII proceedings and from filing any other bankruptcy or reorganization proceedings claiming an ownership interest in the Mansion House Center. *United States* v. *Mansion House Center North Redevelopment Co.*, 455 F. Supp. 434 (E.D. Mo. 1978), aff'd, 594 F. 2d 653 (8th Cir.), cert. denied, 444 U.S. 835 (1979). Eventually, the Illinois proceedings were voluntarily dismissed (Pet. App. A-30 to A-31).

ARGUMENT

Petitioners seek interpretation of Sections 517 and 455 of the Bankruptcy Act, 11 U.S.C. 917 and 855. Both provisions were repealed by the Bankruptcy Reform Act of 1978, Section 401, Pub. L. No. 95-598, 92 Stat. 2682 (Nov. 6, 1978). The issues presented in this case, therefore, are of virtually no prospective importance.[4] Moreover, the decision of the court of appeals is correct and does not conflict with any decision of this Court or any court of appeals. Indeed, the only other court of appeals to consider the issues raised in this case reached the same conclusion as the court below. *In re Thornhill Way I*, 636 F. 2d 1151 (7th Cir. 1980). See *United States* v. *Bristol Hills Apartments*, 461 F. Supp. 1179 (E.D. Mich. 1978).

In pertinent part, Section 517 of the Bankruptcy Act provides (11 U.S.C. 917):

> Nothing contained in * * * chapter [XII] shall be deemed to affect or apply to the creditors of any debtor under a mortgage insured pursuant to the National Housing Act [12 U.S.C. 1701 *et seq.*] and Acts amendatory thereof and supplementary thereto * * *.

It is manifest that this provision would preclude Chapter XII proceedings so long as the creditor "under * * * [the] mortgage insured pursuant to the National Housing Act" is a private party. See *United States* v. *Bristol Hills Apartments*, *supra*, 461 F. Supp. at 1180. Petitioners contend (Pet. 12-15) that because Section 455 of the Bankruptcy Act (11 U.S.C. 855) generally authorizes the Secretary of the Treasury to accept modification of the claims of the United States in Chapter XII proceedings, Section 517 becomes

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[4]The provisions still govern in proceedings commenced under the old Act. Section 403, Pub. L. No. 95-598, 92 Stat. 2683.

inapplicable as soon as the insured mortgage is assigned to HUD upon payment of the mortgage balance.[5] That contention is insubstantial.

Upon assignment, HUD becomes a creditor of the debtor under a mortgage insured pursuant to the National Housing Act to the same extent its assignor was. See *In re Thornhill Way I, supra,* 636 F. 2d at 1153 & n.7.[6] Under Section 455 of the Bankruptcy Act (11 U.S.C. 855), the claims of the United States are subject to modification in Chapter XII proceedings. But that fact is no more relevant to the proper construction of Section 517 than is the fact that the claims of private parties are generally subject to modification in such proceedings. Thus, contrary to petitioners' argument (Pet. 12), there is no conflict between Sections 517 and 455 of the Act.[7]

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[5]Section 455 of the Bankruptcy Act provides in pertinent part (11 U.S.C. 855):

> If the United States is a secured or unsecured creditor of a debtor, the claim thereof shall be deemed to be affected by an arrangement under this chapter, and the Secretary of the Treasury is authorized to accept or reject an arrangement in respect of the claims of the United States.

[6]Section 517 "is not limited by its terms to the time period 'while such insurance on the mortgage remains outstanding'." *In re Thornhill Way I, supra,* 636 F. 2d at 1154. As the court below correctly observed (Pet. App. A-8 to A-9), the phrase, "mortgage insured pursuant to the National Housing Act" is broad enough to include mortgages first insured by and later assigned to HUD.

[7]Even if there were a conflict between the language of the two provisions, of course, Section 517 would be controlling. However inclusive the general language of a statute may be, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment * * *. Specific terms prevail over the general in the same or another statute which otherwise might be controlling." *D. Ginsberg & Sons, Inc.* v. *Popkin,* 285 U.S. 204, 208 (1932) (construing provisions of the Bankruptcy Act). Section 455 is a general provision broadly stating that the interests of the United States are subject to modification by an arrangement under Chapter XII. In contrast, Section 517 is specific,

Similarly, petitioners' reliance (Pet. 8-12) on *Canute S.S. Co.* v. *Pittsburgh & West Virginia Coal Co.*, 263 U.S. 244 (1923), is misplaced. In *Canute* a creditor moved to dismiss an involuntary bankruptcy proceeding on the ground that the requisite number of qualified creditors with provable claims had not joined the original petition. The Court held that any creditor who had intervened in the proceeding and joined the petition before the hearing on the motion could be counted in determining whether the requisite number of creditors had joined the petition, without regard to whether the creditors who had joined the petition initially were qualified. *Canute* provides no support for petitioners in this case. The only real property petitioners own that may be used in a Chapter XII arrangement is fully encumbered by mortgages insured pursuant to the National Housing Act. A Chapter XII arrangement can only have "for its primary purpose the alteration or modification of the rights of creditors * * * holding debts secured by real property * * * of which the debtor is the * * * owner" (11 U.S.C. 806(1)). HUD, petitioners' only creditor holding debts secured by real property, cannot be affected by the arrangement. Therefore, the court of appeals properly affirmed the dismissal of the petitions. See *In re Thornhill Way I, supra*, 636 F. 2d at 1156.

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narrowly addressing the rights of creditors under mortgages insured under the National Housing Act. Having concluded that HUD is a creditor under a mortgage insured pursuant to the National Housing Act, the court below properly found the specific provisions of Section 517 to be controlling. *In re Thornhill Way I, supra*, 636 F. 2d at 1155-1156.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

J. CHRISTOPHER KOHN
Attorney

MAY 1982

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